TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1924

No. [redacted] 285

SOUTHERN PACIFIC COMPANY, APPELLANT,

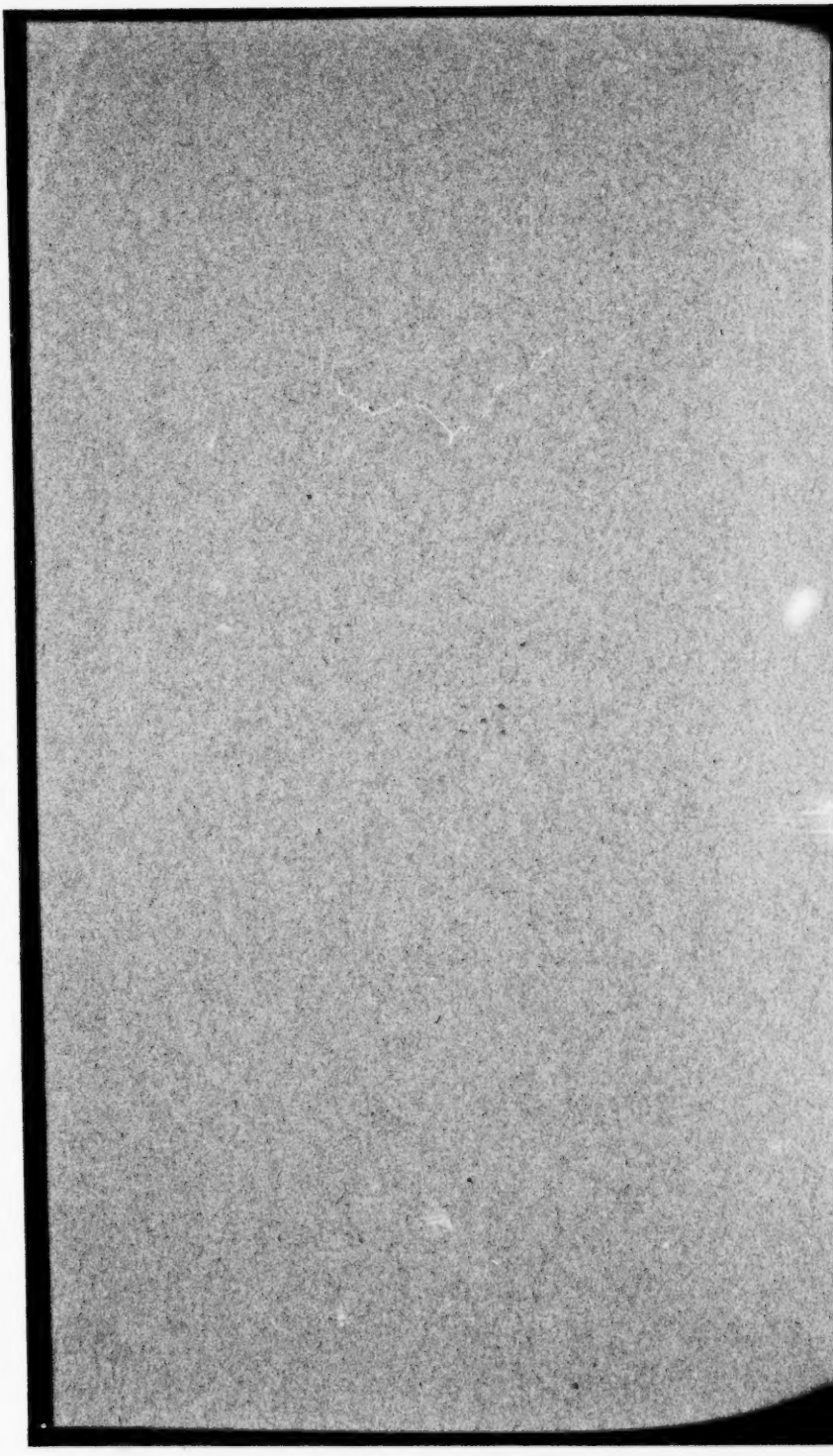
vs.

THE UNITED STATES

APPEAL FROM COURT OF CLAIMS

FILED FEBRUARY 11, 1924

(30,120)



(30,120)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 810

SOUTHERN PACIFIC COMPANY, APPELLANT

vs.

THE UNITED STATES

APPEAL FROM COURT OF CLAIMS

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[fol. 1] **COURT OF CLAIMS OF THE UNITED STATES**

No. 33946

SOUTHERN PACIFIC COMPANY

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On March 1, 1918, the plaintiff filed its original petition.

On May 1, 1918, a general traverse was entered under Rule 34.

Subsequently, to wit, on May 4, 1918, by leave of court, the plaintiff filed an amended petition.

On December 31, 1919, by leave of court, the plaintiff filed its Second Amended Petition.

On January 3, 1922, the plaintiff filed a motion to amend the second amended petition by striking out Paragraph V thereof. Said motion was allowed by the court, January 9, 1922, so that said petition now reads as follows:

II. SECOND AMENDED PETITION—Filed December 31, 1919, as Amended by Court's Order of January 9, 1922

The Southern Pacific Company, claimant, respectfully represents:

I

Claimant is a corporation duly created, organized and existing under the laws of the State of Kentucky, and as such corporation now is, and was, during all of the times when the services hereinafter mentioned were performed, engaged as a common carrier by [fol. 2] railroad in the transportation of passengers and freight in and through various States of the United States and between the points referred to herein, either directly over its own lines or in conjunction with connecting carriers.

II

Under the Acts of Congress granting lands in aid of railroads and Acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, said land-grant railroads were required to transport troops of the United States for certain less amounts than those charged private parties for similar transportation; but in none of said Acts were said land-grant railroads required, nor have they ever agreed,

to transport for such less amounts, as "troops of the United States," nor at other than full tariff fares, the certain persons more particularly referred to in Paragraph IV hereof.

III

Some years ago, and prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including claimant, severally agreed with the Quartermaster-General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of troops of the United States, the lowest net fare, and lowest net excess baggage rate, lawfully available as derived through deductions on account of land-grant distance via a usually [fol. 3] traveled route for military traffic from a lawful fare filed with the Interstate Commerce Commission as applying from point of origin to destination at time of movement. These agreements, commonly known as "Land-Grant Equalization Agreements", were in force at the times of the transactions hereinafter referred to. (Circular No. 23, Quartermaster General's Office, 1911, dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913, entitled "Freight and Passenger Land-Grant Equalization Agreements and List of Carriers Participating," printed and published by the Government.)

IV

At various times between March 1, 1912, and the date of the filing of the original petition herein, claimant, upon transportation requests issued by the War and Navy Departments of the United States, transported certain persons belonging to the following classes, to wit:

1. Applicants for enlistment in the Army:

(a) Accepted applicants, i. e., applicants examined at general recruiting stations and found mentally, morally and physically fit for service and being forwarded to recruiting depots or depot posts for final examination and actual enlistment.

(b) Rejected applicants, i. e., those finally rejected at the recruiting depots or depot posts and being returned to the recruiting stations whence they came.

2. Discharged military prisoners, i. e., discharged enlisted men en route to their homes or elsewhere after serving sentence as military prisoners.

[fol. 4] 3. Discharged soldiers, i. e., former enlisted men of the Army en route to their homes after discharge.

4. Retired soldiers, i. e., enlisted men of the Army en route to their homes after retirement.

5. Furloughed soldiers, i. e., enlisted men of the Army on furlough en route back to their proper stations.

6. Deserters from the Army and Navy, payment for whose transportation was charged and collected by the Government from said deserters at full tariff fares.

7. Coast Guard, while under the Treasury Department.

8. Members of the National Guard prior to their muster into, or subsequent to their muster out of, the service of the United States.

9. Selective service men prior to their muster into, or subsequent to their muster out of, the service of the United States.

10. Other persons not mustered into the military or naval service of the United States.

In making payment for said transportation services the United States, through its accounting officers, (in many instances against the express protest and objection of the claimant) paid claimant for said transportation only the less amounts authorized for the transportation of "troops of the United States" over land-grant railroads, instead of at the published tariff fares.

VI

The total difference between the amounts so paid claimant for [fol. 5] such transportation at land-grant rates, as for the transportation of "troops of the United States", and the amounts which claimant was entitled to receive therefor at published tariff fares without land-grant deductions, is, according to the claimant's books and records, $219,091.26.

VII

Wherefore claimant says there is now justly due and owing it by the United States the sum of Two Hundred and Nineteen Thousand and Ninety-one Dollars and Twenty-six Cents ($219,091.26), exclusive of all just credits and offsets, for which amount it prays judgment.

Claimant has at all times borne true allegiance to the United States, and has made no assignment or transfer of the aforesaid claims or of any interest therein.

Southern Pacific Company, Claimant, by Charles H. Bates, Its Attorney in Fact. Harr & Bates, Attorneys for Claimant.

[fol. 6] Jurat showing the foregoing was duly sworn to by Chas. H. Bates: omitted in printing.

[fol. 7] III. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

IV. Argument and Submission of Case

On December 14, 1921, this case was argued and submitted on merits by Mr. William R. Harr, for the plaintiff, and by Mr. Perry W. Howard, for the defendant.

V. History of Further Proceedings

On December 19, 1921, the court filed an order remanding the case to the Calendar, and allowing plaintiff to amend its petition and for the introduction of further testimony by either party.

VI. Reargument and Submission of Case

On January 30, 1923, the case was argued and submitted on merits by Mr. William R. Harr, for the plaintiff, and by Mr. Perry W. Howard, for the defendants.

VII. History of Further Proceedings

On February 19, 1923, the court filed an order filing tentative findings, and setting same for hearin- March 5, 1923.

IX. Argument and Submission on Tentative Findings

On March 5, 1923, the case was argued and submitted on tentative findings of fact.

[fol. 8] X. History of Further Proceedings

On May 16, 1923, the plaintiff filed a motion for leave to take further testimony.

On May 21, 1923, the court filed an order allowing said motion.

XI. Final Submission of Case

On December 3, 1923, the case was submitted on merits, without argument, on stipulation of parties, by Messrs. Harr & Bates, for the plaintiff, and by Messrs. Perry W. Howard and Louis R. Mehlinger, for the defendant.

[fol. 9] **XII. Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.**—Entered January 7, 1924

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact

I

Plaintiff is a corporation of the State of Kentucky and during all of the times when the services hereinafter mentioned were performed was engaged as a common carrier by railroad in the transportation of passengers and freight in and through various States of the United States and between the points referred to herein, either directly over its own lines or in conjunction with other carriers.

II

Under acts of Congress granting lands in aid of railroads and acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, said land-grant railroads were required to transport "troops of the United States," for certain less amounts than those charged private parties for similar passenger transportation.

III

Prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including plaintiff, severally agreed with the Quartermaster General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of troops of the United States, the lowest net fare and lowest net excess baggage rate lawfully available as derived through deductions on account of land-grant distance via a usually traveled route for military traffic from a lawful fare filed with the Interstate Commerce Commission [fol. 10] as applying from point of origin to destination at time of movement. These agreements, commonly known as "land-grant equalization agreements," were in force at the times of the transactions hereinafter referred to.

IV

Between March 1, 1912, and December 31, 1917, both dates inclusive, plaintiff transported, upon transportation requests issued by the War and Navy Departments, a number of persons for the defendent, all of whom, with the exceptions hereinafter stated, belonged to the several classes of persons enumerated in case No. 33056 in this court, Union Pacific Railroad Company, plaintiff, decided February 19, 1917 (52 Ct. Cl. 226; affirmed 249 U. S. 354), to wit applicants for enlistment in the Army, including accepted as well as rejected applicants prior to actual enlistment, discharged military prisoners; discharged soldiers, retired soldiers and furloughed soldiers.

Among the persons so transported were also certain persons designated as "civilian employees of the War Department," some "commissioned officers, Engineer Office, War Department" and certain other persons designated in the reports of the Treasury Department herein as "guard," "nurse," "attendant," etc.

V

For all of the aforesaid transportation plaintiff was paid by defendant in the reduced amounts required by the aforesaid railroad land-grant acts and Army appropriation acts for the transportation of "troops of the United States" over land-grant railroads.

For all such transportation plaintiff stated its bills on the prescribed form of voucher for transportation subject to land-grant deductions, stating therein in appropriate columns the mileage of land-grant road, the number of men, the rate per man, the gross amount, the "amount to be deducted on account of land grant" and in the final column the "amount claimed" which was the gross amount less land-grant deduction, and certified the account as stated to be correct.

VI

Upon a part of the vouchers for the transportation here involved there was written, typewritten, or stamped by the plaintiff company, before the voucher was paid, one of two forms of "protest," referred to as the "short form" and the "long form," as follows:

The short form: "Amounts claimed in this bill accepted under protest."

The long form: "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S. such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed."

The "short form" was understood by the clerk who handled these bills in the office of the disbursing quartermaster at San Francisco as addressed to the matter of land-grant rates and to be for the purpose, on the part of the plaintiff, of reserving a right to present

[fol. 11] a further claim for full commercial fares to the accounting officers or the courts.

NOTE.—The use of the word "protest" in this and other findings with refernce to the two forms of indorsement set out imports no finding by the court as to the nature or effect of those indorsements.

VII

The total amount claimed and paid for the transportation here involved from January 1, 1914, to October 1, 1914, was $128,475.31, which sum by reason of land-grant deductions shown upon the vouchers as presented was $71,560.92 less than plaintiff would have been entitled to receive at full commercial rates. The number of vouchers presented therefor was 508.

Of said 508 vouchers involving said sum of $71,560.92 an account of land grant, 201 thereof involving $24,176.62 of land grant had the short form of protest stamped thereon, 4 thereof involving $843.96 of land grant had the long form of protest written or typewritten thereon (making the total presented land-grant deductions during this period $24,443.81), and 303 thereof involving $46,540.34 of land grant bore neither form of protest.

Of the vouchers protested during said period, the amount of land grant involved in the transportation of each of the following classes was as follows: Applicants for enlistment, accepted and rejected, $1,745.45; discharged military prisoners, $876.61; discharged soldiers, $15,484.62; retired soldiers, $336.46; furloughed soldiers, $5,733.48, and civilian employees of the War Department, $267.19, making a total of $24,443.81, of which the amount of land grant involved in the vouchers bearing the long form of protest was $843.96, all on account of the transportation of discharged soldiers.

VIII

Beginning with October 1, 1914, the plaintiff began systematically to type on its bills, before presentment, the long form of protest, and, with some exceptions, used it on its bills for the classes of transportation here involved during the period from that date to June 18, 1916, on which date the interterritorial military arrangement between the United States and the railroads, this plaintiff included, became effective.

The bills for transportation here involved during that period were all upon the prescribed form for transportation subject to land grant as stated in the preceding finding with reference to the bills for the period therein referred to. They were 728 in number for an aggregate amount claimed and paid of $109,150.64, which, by reason of land grant, was $75,467.74 less than full commercial rates, and 516 thereof involving land grant to the amount of $50,678.94 bore the long form of protest, 212 thereof involving land grant to the amount of $24,788.80 not bearing any protest.

Of those protested the amount of deducted land grant involved in the transportation of each of the several classes of travelers was

as follows: Applicants for enlistment, accepted and rejected, $9,235.56; discharged military prisoners, $3,431.34; discharged soldiers, $7,865.96; retired soldiers, $202.87; furloughed soldiers, [fol. 12] $29,767.28; and civilian employees of the War Department, $175.93, making a total of $50,678.94.

The apportionment to enumerated classes of land grant involved in unprotested bills during this period ($24,788.80) is not shown.

IX

All of the bills for transportation here involved for the period from March 1, 1912, to January 1, 1914, were upon the regular form of land-grant voucher in form as stated in Finding V and were unprotested except one bill for transportation furnished in September, 1913, which bore the short form of protest, and involved deducted land grant to the amount of $294.06, distributed as follows: 16 discharged soldiers, the land-grant deductions on which were $220.20; 2 discharged military prisoners, land-grant deductions $27.59; 2 retired soldiers, land-grant deductions $14.67, and 2 persons not classified other than as falling within the several lists mentioned in the Union Pacific case, land-grant deductions $31.60. The total amount of land grant deducted in the rendition of bills during this period for the transportation of the classes of persons enumerated in the preceding findings was $39,253.54.

All bills herein involved for the entire period from March 1, 1912, to June 18, 1916, inclusive, were paid at land-grant rates as presented and in the amounts stated therein under the column heading "Amount claimed."

X

The plaintiff, asserting its nonintention to concede in principle the application of land-grant rates to the travel of such classes of persons, waives, so far as this case is concerned, all claims on account of travel of persons other than those enumerated above whose status was determined in the Union Pacific case, 52 Ct. Cl. 226; 249 U. S. 354, and civilian employees of the War Department.

Plaintiff also waives all claims herein on account of transportation furnished subsequent to the taking effect of the interritorial military arrangement, June 18, 1916.

Plaintiff has not included herein and consideration is not given to certain claims for transportation between April 17, 1914, and June 18, 1916, which at the time of the commencement of this suit were pending on supplemental bills before the Comptroller of the Treasury and which are embraced in case No. 34564 subsequently commenced and under submission herewith.

XI

At various times prior to the furnishing of the transportation here involved the Comptroller of the Treasury had held that land-grant railroads could be paid for the transportation of the classes

of persons enumerated in the Union Pacific case, supra, only at land-grant rates and disbursing officers were authorized to make payment on that basis only.

Because of such rulings the plaintiff company previous to January 1, 1914, had presented its bills for such transportation at land-grant [fol. 13] rates and accepted payment thereof at such rates, without protest, and had taken no steps to enforce payment at any other or different rate.

After January 1, 1914, it continued to present its bills to disbursing officers at land-grant rates and accept payment thereof as presented, but on a part thereof, for services between that date and October 1, 1914, it wrote, typed, or, for the most part, stamped protests on the voucher in the form and to the extent heretofore found. It knew that disbursing officers were not authorized to and would not pay such bills at other than land-grant rates and payment could be more promptly secured by presentment to disbursing officers than otherwise.

It began systematically to endorse protests in the long form on its bills on October 1, 1914, and thereafter followed that practice as and to the extent shown in Finding VIII.

At some time in the latter part of 1914, the Union Pacific Railway Company, which was then represented in Washington in the matter of claims against the Government by the same attorney who represented the plaintiff company in the same capacity, presented its claim to the Auditor for the War Department for the transportation at regular published passenger rates of certain rejected applicants for enlistment, discharged military prisoners, discharged enlisted men, retired enlisted men, and furloughed men returning to their stations, which the auditor disallowed to the extent of the applicable land grant, and upon appeal to the Comptroller of the Treasury, the comptroller, on March 24, 1915, affirmed the action of the auditor.

Thereupon that company commenced its action in this court (case No. 33056) on April 29, 1915, which was decided by this court February 19, 1917 (52 Ct. Cl. 226), and on appeal affirmed by the Supreme Court (249 U. S. 354).

Conclusion of Law

On the facts found the court concludes as matter of law that the plaintiff is not entitled to recover, and that its petition ought to be dismissed.

It is therefore adjudged that plaintiff's petition be and the same is dismissed with judgment against the plaintiff for cost of printing the record herein, to be taxed and collected by the clerk.

Opinion

Downey, Judge, delivered the opinion of the court:

Plaintiff seeks to recover on account of a large number of items of personal transportation furnished between March 1, 1912, and June

18, 1916, in exchange for the usual Government transportation requests, the basis of the claim being the difference between the amounts claimed in its bills and paid as claimed, at land-grant rates, and the full tariff rates for such transportation; in other words, it is a suit to recover, on account of this transportation, the amounts deducted from full tariff rates on account of land grant, such deduction having been made by the plaintiff itself in the rendition of its bills.

The claim as originally presented, covering the period from March 1, 1912, to December 31, 1917, inclusive, has been reduced by the abandonment of that portion subsequent to June 18, 1916, because [fol. 14] of the taking effect on that date of what is known as the interterritorial military arrangement, and by the abandonment of claims on account of the transportation of persons other than those belonging to the following classes: Applicants for enlistment, both accepted, but traveling before final acceptance, and rejected; discharged military prisoners; discharged soldiers, retired soldiers; furloughed soldiers; and civilian employees of the War Department.

It may now be said that the status of the classes named, civilian employees excepted, is no longer in question for the purposes of this case, since it was held by this court in the case of the Union Pacific Railway Company, decided February 19, 1917 (52 Ct. Clms. 226), that they were not within the designation "troops" and therefore not within the provisions of the land grant acts as to transportation of troops and property of the United States, a decision which upon appeal was affirmed by the Supreme Court (249 U. S. 354), but because of other features of the case determinative of plaintiff's rights and necessarily for consideration, the situation previous to the decision referred to must be looked to. And since it is apparent that questions involved in this case growing out of procedure with reference to these claims are important for determination not only as affecting the rights of this plaintiff in this particular case but because we must know that they, under like or similar circumstances, are involved in other pending or to be anticipated litigation, we shall feel justified in treating the situation somewhat in detail.

But preliminarily it is perhaps well to dispose of the status of "civilian employees of the War Department" included to a limited extent in this action, but not included in the decision above referred to, by concluding, without discussion, that such travelers were not "troops" of the United States within the purview of the land grant acts, this expression, however, involving no opinion as to the possible status, under some circumstances, of civilian employees, of the Army.

It may be said generally that previous to the decision of this court in the Union Pacific case and for some time previous to the period involved herein, the status of the classes of persons considered therein was, for transportation purposes, that of troops of the United States by reason of holdings by the Comptroller of the Treasury that for their transportation railroad companies could be paid at land-grant rates only. And such matters being unquestionably within the jurisdiction of the comptroller, whose decisions as to the expenditure of appropriated moneys were conclusive, such holdings established the

status of these various classes of travelers for transportation pay purposes at least so long as resort was not had to a proper judicial tribunal in an attempt to enforce a right to other and different compensation and no attempt along this line was made by this plaintiff at any time or by any other railroad company until the institution of the Union Pacific case, supra, which was commenced in this court on April 29, 1915.

The case naturally divides itself for consideration into three periods, viz., March 1, 1912, to December 31, 1913, inclusive; January 1, 1914, to September 30, 1914, inclusive; and October 1, 1914, to June 18, 1916, inclusive, and separate findings are addressed to these periods.

To avoid repetition of facts common to each of these periods, it may here be said that all of plaintiff's bills for transportation here [fol. 15] involved were stated upon the regular approved form of voucher for such transportation of passengers as was subject to land-grant deduction, and by "approved" form is meant a form prescribed by the Comptroller of the Treasury with the approval of the Secretary of the Treasury under authority of the Dockery Act. See 28 Stat. 206, sec. 5. This form required the stating of the claims in separate columns under the following headings: "Date," "No. of transportation request," "From," "To," "Total distance," "Miles of land-grant road," "No. of men," "Rate per man," "Gross amount," "Amount to be deducted on account of land grant," and "Amount claimed." A certificate followed stating among other things that "the above account is correct and just," to be signed by the transportation company by some proper representative, and upon the form was the following instruction: "Certification and bill to be completely filled in by payee or before signature by payee, without alteration or erasure thereafter." See 14 Comp. Dec. 977.

The use of this and other forms relating to Government transportation was specifically prescribed by Department Circular No. 62, dated October 29, 1907, issued by the Comptroller of the Treasury with the approval of the Secretary. (14 Comp. Dec. 967.)

This form was slightly changed, principally in its "make-up," on two occasions subsequent to the promulgation of the form set out in 14 Comp., but the essential requirements above stated were all retained and appeared in all land-grant voucher forms prescribed for use from 14 Comp. to and throughout the period here involved.

At the same time that this voucher form for transportation of passengers subject to land-grant deduction was prescribed appropriate forms were also prescribed for vouchering transportation not subject to land grant. From them the columns headed "Miles of land-grant road," "Gross amount," and "Amount to be deducted on account of land grant" were omitted. (See circular above referred to and Form No. 8 on page 980, same volume.) These and other prescribed voucher forms were available to the railroad companies in such quantities as they might desire, and it was therefore the option of a railroad company, in the first instance, to state its claim on such form as it might deem appropriate thereto.

For the first of these periods beginning March 1, 1912, all bills

involving land grant to the amount of $39,253.54 were thus presented and paid as presented and there was no other action with reference thereto except that upon one bill for transportation in September, 1913, involving land grant to the amount of $294.06, there was stamped what is now called the short form of protest, viz., "Amounts claimed in this bill accepted under protest." Throughout this period, therefore, with the single exception stated, the effect of which, if any, we will hereafter consider, there was manifest no intention otherwise than to acquiesce in the then prevailing rule as to the status of these travelers and to claim for their transportation land grant rates only, and we may reasonably presume that this had been the attitude of plaintiff for some time preceding this period, for the rulings as to the status of these persons had considerably antedated it except as to discharged soldiers who were not furnished Government transportation until after the passage of the act of August 24, 1912 (37 Stat. 576), but had theretofore received travel pay, and there is no indication that the fixing of March 1, 1912, as the be-[fol. 16] ginning of this period indicated any change of policy or anything other than that it was the utmost limit to which the period of six years before the commencement of this suit on March 1, 1918, would reach. As to this period it is sufficient to say that recovery is precluded under the authority of Baltimore & Ohio Railroad Company v. United States, 52 Ct. Clms. 468, and Oregon-Washington Railroad and Navigation Company v. United States, 54 Ct. Clms. 131, affirmed 255 U. S. 339.

With the second period here involved, commencing January 1, 1914, began a practice of typing, or for the most part stamping on the vouchers, rendered and certified as heretofore stated, a form of "protest," although all vouchers were not so "protested." And it is the alleged practice of the plaintiff with reference to the protesting of vouchers which divides the case into the three periods, a different practice prevailing in each period to such an extent as to justify the separation, although there was not complete uniformity. The first period is therefore treated as a period of no protest, which is true as to all of that period with the single exception noted; the second period is the period during which the prevailing practice was to stamp on the vouchers the "short-form" protest; and the third period is one during which, upon most vouchers, the "long form" of protest was used. The use of the word "protest" is for convenience and in line with plaintiff's presentment of its case without intention thereby to commit ourselves as to the legal effect of the words used under the circumstances.

During the second period, from January 1, 1914, to October 1, 1914, there were 508 bills involving a total land grant of $71,560.92, of which 201 involving $24,176.62 of land grant bore the short form of protest, 4 involving $843.96 of land grant bore the long form of protest, and 303 involving $46,540.34 of land grant bore no protest. Thus of 508 bills involving $71,560.92 of land grant 201 thereof involving $24,176.62 of land grant had stamped on them before presentment the words, "Amounts claimed in this bill accepted under protest," and, eliminating from the discussion for the present the few cases in which another form was used and which must be the

subject of discussion as to the third period, we must consider the legal effect of this procedure. It is contended that when plaintiff began in January, 1914, the practice "of noting on its bills its formal protest against a settlement at land-grant fares" and continued the practice with some degree of regularity although it appears that it "protested" less than half its bills, it put the accounting officers on notice that it was claiming full tariff fares for all such transportation and was rendering its bills and accepting payment at land-grant fares under protest and as part payment only. If its practice determines its policy it is for consideration that in a majority of cases its bills bore no protest.

The striking feature of this situation is that the plaintiff puts itself in the position of rendering a bill for a stated amount, found under the heading "Amount claimed," arrived at by the application of correct mathematics to previously stated amounts, certifying that the amount is correct and just, and then stamping on the voucher before presentment a statement that the "amount claimed," necessarily by it, and shown by its certification to be correct, is accepted under protest.

[fol. 17] We are conversant with the argument that disbursing officers, under rulings of the comptroller, could pay no more, and that it was useless to present to them a claim for more, but we have fully pointed out in the Baltimore & Ohio and Oregon-Washington Cases, supra, the methods of procedure open to claimants if they desired in fact to present their claims upon a different basis. And it may be said that railroad companies and their officers and attorneys were very familiar with all these methods. Such a conclusion must follow from the extent and frequency of their claims, necessitating resort to established settlement methods, and, indeed, familiarity with the accounting system appears from the testimony of plaintiff's attorney in this case. Any other conclusion would no doubt be regarded as a reflection on his long experience and competent service in the interest of railroad claimants. But, notwithstanding the availability of this other and better procedure, if a claimant desired in fact to assert a right to something more than it could obtain at the hands of a disbursing officer, we need not now determine whether it could not preserve a right by a proper protest, since that question will naturally be for later consideration in its application to any form of protest. As to the procedure now under consideration, we do hold that such a so-called protest was not in fact an effective protest, if there could be one, and under the circumstances could avail the plaintiff nothing.

We frequently encounter the apparent belief that a "protest" is "something to conjure with" under almost any circumstances: that it wipes out the disastrous results of any course of conduct; and that it creates as well as preserves rights. Equally is it sometimes the view that whatever its form or applicability it is only necessary to label it a "protest" and it is a protest. And these observations are not at all antagonistic to the idea that there may in fact be protests, rightly so called, and that they may at times be very efficacious in the accomplishment of their intended purpose, but suggest rather the necessity of determining whether a so-called "protest" is in fact and

in legal effect a protest, and whether, under the circumstances, it accomplishes anything as affecting the rights of the protestor. In one of our early cases, 13 Ct. Cls. 70, a protest was characterized as "so much waste paper," and in numerous cases they have been held ineffective for any purpose.

We find no established rule with reference to any particular form of protest in general, and this quite naturally so since the circumstances of each case must largely determine the applicable form, although in some cases in which protests are provided for by statute particularity is required as, for example, in the matter of protests as to customs duties when the requirement is that it shall set forth "distinctly and specifically and in respect to each entry or payment the reasons for his objections thereto," while in other cases wherein the action taken is of such specific character that there is but one possible subject matter for protest the requirement only is that there shall be protest, which by necessary implication addresses itself to but the one matter, and that the action of a party other than the protestor.

To us it seems but reasonable to hold that if the transaction itself does not so define the situation that a protest in general terms can have but one application, and that an application entirely consistent [fol. 18] with the relations of both parties to the transaction, then a protest must so specifically state its subject matter and the respect in which action had is objected to that its purpose may clearly appear on its face.

We know now, in our consideration of this case, that plaintiff's contention is that the transportation in question was not subject to land-grant deduction, but the short form of protest used presented no question of land grant to the disbursing officer any more than it presented any one of the several other questions which might be involved in data stated in the voucher. So far as appears it might have been a question as to the number of men, the mileage traveled, the correct land-grant mileage, or the gross rate as well as the applicability of land-grant rates.

It is true that we were requested to find as a fact that the plaintiff's procedure after January 1, 1914, put the accounting officers on notice that plaintiff was claiming full tariff fares and was rendering its bills and accepting payment at land-grant rates "under protest and as part payment only" and, upon submission of tentative findings, we were again requested to find that:

"It appears from the evidence that the short form of protest was understood by the accounting officers of the Government to mean that the plaintiff protested against the requirement of land-grant deductions on the classes of transportation covered by the bills to which said protest was attached."

And it is true that a passenger rate clerk on the transportation rate board in the General Accounting Office testified that it was a part of his official duties to audit such bills and that it was his understanding that in using such form of protest the plaintiff company was protesting against making any land-grant deduction; but aside from the competency of this testimony for this purpose, which we more than question, the transactions as to the presentment and payment

of these bills relate back to the time of their presentment to and payment by the disbursing officer, and we are unable to see how that situation can be affected by the understanding of anyone in the accounting office when the disbursing officer's accounts were thereafter being audited. The clerks in the account office were then determining the credits to which the disbursing officer was entitled, in the settlement of his accounts, by reason of the payments made on these vouchers and with that determination their duties with reference thereto ended. They were not then considering any claim of the plaintiff submitted for allowance or otherwise and had no question before them as to the purpose or effect of the protest, and authority to speak as to the "understanding" of the accounting officers does not appear.

It should now be suggested that during consideration of this case on first submission certain information then came to our attention with reference to possible practices in the offices of disbursing officers by way of departure from authorized procedure, indicating the possibility that injustice to the plaintiff might result if the case were considered solely in the light of authorized rather than actual procedure on the part of disbursing officers, and the case was remanded with leave to take further testimony if desired.

Upon resubmission the record contains the testimony of a witness who was a clerk and for a part of the time head clerk in the office of the disbursing officer by whom these bills were paid, this clerk [fol. 19] having in usual course handled the bills or at least a part of them so that he had knowledge of the use thereon of this short-form protest.

Based upon his testimony and that already in the record above referred to we are now asked to modify the tentative findings by adding a finding to the effect that it was understood by the disbursing officer and by the accounting officers that in using this short-form protest the plaintiff was protesting against the settlement of its bills at land-grant rates and was preserving a right to make further claim for full commercial rates before the accounting officers and the courts.

We are very willing to give the plaintiff any finding to which it may be entitled and prefer to err through liberality rather than otherwise, but we do not find that this witness qualified himself to testify as to the understanding of the disbursing officer, and we have, we think, gone as far if not further than justified when we incorporate in the findings of facts a statement as to the understanding of this witness himself as to the meaning and purpose of this protest. And in connection with the testimony of this witness we may suggest that if all his statements as to practice in the disbursing office were converted into findings of fact, it would be of very doubtful value to plaintiff, for it must carry with the things relied upon as of value other matters clearly not so to be regarded by the plaintiff, notably the refusal to settle disputed claims and the settlement only of those matters as to which the claimant and the disbursing officer were in agreement. Comment upon this testimony, not incorporated in the findings, is only justified for the purpose of indicating its careful consideration in all its phases.

Aside from the probative value of the testimony as to the under-

standing of the disbursing officer, it is to be suggested in this connection, perhaps to be again referred to, that whatever the understanding of the disbursing officer may have been as to the purpose or effect of this protest, he was an officer of very limited powers, and his understanding or even his approval could not have served to create any liability against the United States not otherwise existent.

Other testimony upon resubmission, apparently intended to indicate the continuing intention of the plaintiff to contest the application of land-grant rates to the classes of transportation involved, is largely a recital of communications between railroad officials on the subject, not a proper basis for a finding of fact, and probably with full comprehension of that fact no request for a finding based thereon is submitted.

In addition to suggestions made as to the indefinite character of this protest, we are asked to conclude that a public voucher made in the detailed form indicated and certified to be correct, not only as to its details but as to the "amount claimed," and which is required to be completely filled in before certification, without alteration or erasure all to the evident purpose that there shall be stated a clean-cut demand which may be paid by a disbursing officer at the "amount claimed" and that only, for which it becomes his acquittance, can be converted into a claim for a partial payment with reserved right to make further claim as to the same service by stamping thereon the statement that the "amount claimed" which has been stated and certified by the claimant, is "accepted under protest."

[fol. 20] We can not subscribe to such a theory. Its inconsistency, as well as its apparent purpose to take advantage of a method of settlement designed to accomplish finality while at the same time subverting that purpose, condemns it. And in that connection the necessities of Government accounting are properly for consideration and perhaps ought to be reverted to more than they are. With these necessities and the disadvantages of lack of finality in Government accounting those doing business with the Government not only are, for the most part, familiar, but should be chargeable with knowledge and, unless required for the protection of a legal right not otherwise to be asserted, practices which impose unnecessary burdens on the governmental system should not be encouraged by judicial sanction. And for consideration also is the fact that appropriations are for the service of fiscal years—that they are available for such time thereafter as Congress has thought reasonable to permit the adjustment of claims payable therefrom, a situation indicative of intention to accomplish reasonably prompt presentment and settlement of claims.

And if by such a procedure as that under consideration the finality of a settlement such as those here involved may be suspended and an account thus settled be held to be still open for further claims, predicated on the same service, to be asserted at any time within the six-year period of limitation, is there any reason why such a protest stamped upon any voucher in settlement of any claim of any

character might not obviate its finality and serve to hold the whole matter open and subject to further claim at least until the intervention of the statute of limitation? If there is one thing apparent, predicated upon our observation in these matters, it is the great need for a revised system which shall require the prompt presentation of claims not only to the administrative and accounting offices but to this court as well, and while we can not assume legislative function, and we certainly can not but recognize and protect any right legal under the present system, we are not disposed by judicial construction to extend beyond legal requirements the effect of unnecessary and detrimental practices.

We think it quite clear that the use during this period of this form of protest could avail the plaintiff nothing. Aside from the infirmity in the form of the protest, which sufficiently determines its value, what must be said in the discussion of the following period as to the efficacy of any protest will be applicable.

As to the third period the contention is that at the beginning thereof, on October 1, 1914, a different practice was inaugurated in that on the vouchers, all stated on the approved form as hereinbefore outlined, there was typed, before presentment, the long form of protest, as follows:

As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S., such fares are shown herein but under protest, and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the service performed."

During this period extending to the taking effect of the interterritorial military arrangement on June 18, 1916, there was pre- [fol. 21] sented 728 vouchers involving land grant to the amount of $75,467.74 516 of which, involving land grant to the amount of $50,678.94, bore this long form of protest; and 212 involving $24,788.80 of land grant bore no protest, so that the practice was not uniform but sufficiently so as to justify the treatment of the period on the basis of the long-form protest.

It is for observation first that this form of protest is not subject to the objection of indefiniteness suggested as to the short form. It pointed out the specific subject matter of the protest and the reason therefor.

But while it is specific, the very respect in which it is specific precludes the construction sought to be put upon it. It is urged as preserving a right in the plaintiff to seek additional compensation as to all persons within any of the classes under discussion, whereas by its express terms it is addressed only to "discharged soldiers." And it is to be interpreted not alone upon the inclusion of this class only in its terms but also upon the familiar rule, Inclusio unius est exclusio alterius. Any right preserved, therefore, by this form of protest must be limited to discharged soldiers, the class, however, which involves the larger part of the claim.

The effect of the use of this form of protest upon these vouchers under such circumstances is the important question for consideration and one, perhaps, not free from doubt. The findings have stated the facts separately as to each one of the classes involved, because it was conceived that under this form of protest there might be a right of recovery as to discharged soldiers which did not extend to other classes.

But, after all, does either form of protest under the circumstances preserve any existing right to additional compensation? The question can not be treated with the brevity which is desirable and its importance must justify such extended discussion as may seem necessary to a comprehensive presentment of the situation dealt with and our views with reference thereto.

A protest can not create a right. It may preserve an existing right, although, when opposed by inconsistent action or circumstances, it may not always do that. Its chief function is, under appropriate circumstances, to avoid the effect of apparent acquiescence in the action of another.

Let us assume that at the time now in question the plaintiff believed, contrary to the holding of the comptroller, that it was entitled to be paid full tariff rates for the transportation in question. By its protest it indicates knowledge of the fact that the "accounting officers" disclaimed any authority to pay more than for the transportation of troops of the United States—that is, more than land-grant rates. It uses the words "accounting officers" although it was dealing with the presentment of its claims to disbursing officers, and there is a difference. The accounting officers, as the accounting system was then constituted under the Dockery Act, were, so far as its business was concerned, the Auditor for the War Department and the Comptroller of the Treasury. A disbursing officer was an accountable officer who accounted to the accounting officers for funds advanced to him on accountable warrants for which the vouchers paid by him are his acquittance when his accounts go to the auditor for settlement.

[fol. 22] An essential difference in practice is found in the fact that a Government creditor could present him claim to an auditor for the full amount claimed to be due, in this case full tariff rates. Upon disallowance by the auditor of any part of an item of a claim, land grant in this instance, the claimant had a right of appeal to the comptroller, but by statute it could not accept the part of a claim allowed by the auditor and have an appeal as to the disallowed part. (28 Stat., 208.) It must in case of appeal to the comptroller, send in the warrant issued to it for the allowed part of the claim so that the comptroller might pass upon the whole claim and adjust an over as well as an under payment. Then there was, of course, access to this court, in connection with which it is important to consider that previous action either by accounting or disbursing officers is not an essential to the jurisdiction of this court in this class of cases.

Quite materially different was the practice when claims were presented to a disbursing officer for payment and, aside from the presumptions, it is quite out of the question to assume anything else

than actual knowledge of disbursing officer's practice and authority on the part of those dealing so frequently with them. The number of claims involved in this case is illustrative of the extensive resort to this method of settlement and necessarily resultant knowledge. A disbursing officer was not permitted to receive a claim, disallow a part and pay the remainder as was the auditor. Reasons are too apparent to need amplification. A disbursing officer could only pay a claim when he deemed himself authorized to pay the "amount claimed." This is in line with and explains the suggestion frequently made in this class of cases, and in the instant case, that when claims were sometimes presented to disbursing officers for such transportation at full tariff rates claimants were informed that they could not be paid as presented and if it was desired to procure payment at the hands of the disbursing office, the most expeditious way of realizing on a claim, it was necessary to restate the bill on a basis upon which the disbursing officer was authorized to pay, since, as stated, the disbursing officer could not disallow in part and pay in part as might the auditor, and the necessary restatement of accounts, to procure payment by this method, is the basis of contention that the claim is thus under duress.

It is perhaps as well here as later to say that with this contention we can not agree, for in point of fact there is to be found in the transaction no element of duress at all, and this seems so apparent that it is hardly worth while to discuss at length what may constitute duress. The disbursing officer, in such circumstances, does in effect say to the claimant, "You must state your claim on the basis upon which I can pay it and none other if you want payment at my hands," but there is no compulsion so to proceed, for other doors are open wherein the claimant may state its claim as it sees fit. And if it suggests, as has so often been done, the probable futility of proceeding through the accounting officers, where it could, at least be in the position of asserting its full claim, no matter what the result, its contention is not aided, for in addition to the right to so assert the claim to the accounting officer there was always access to this court independent of precedent action. And so the stating to a disbursing officer of an account upon the basis required by him if he is to pay it is nothing but a compliance with conditions neces- [fol. 23] sary to procure a settlement by that method, which a claimant must regard as to its advantage, rather than other procedure, and can not be regarded otherwise than as purely voluntary on its part.

This condition, however, is of weight in determining the status of a disbursing officer's settlement, a matter of importance in the consideration of the effect, if any, to be given a protest indorsed thereon, a procedure which the disbursing officer should not have permitted, since its purpose is to convert a disbursing officer's voucher into something else than that which, under authoritatively established practice, it was intended to be. And that was not a right possessed by a claimant, for it amounted, if it amounted to anything, to a modification of a voucher form prescribed by proper officers under authority of law and therefore as essentially a requisite of a

proper amount as if prescribed by the law itself. For this form of voucher, used in the instances under consideration, a form for use in claiming for transportation subject to land-grant deduction, provided for the statement in appropriate columns of all the data necessary to the proper determination of the "amount claimed" which was required to be certified by the claimant as correct, contemplated a complete statement of the claim in full, not subject to alteration, and evidencing, when paid, a completed transaction, the voucher having no further function than to procure for the disbursing officer a proper credit for the amount shown thereby to have been claimed by the creditor and paid by the officer. Mistakes of fact occurring therein would no doubt be subject to correction, but with that matter we have nothing to do here.

It is therefore clearly subversive of the intended character and effect of a settlement made as lawfully prescribed to conclude that such a settlement in all respects intended to be final, and which without the element of finality in the sense of payment in full, did not authorize the payment thereon of appropriated public funds by a disbursing officer, to conclude that a claimant by some process of protest indorsed by it thereon could thus convert such an instrument into a claim for partial payment with reserved right as to further compensation for the same service.

The inconsistency of the procedure has heretofore been alluded to. Its attempt to accomplish by this method that which by usual processes could not be accomplished is strongly argumentative. We have seen that the claimant might not, in one of the instances under consideration, have presented to a disbursing officer a claim for full tariff rates, have procured the disbursing officer to disallow a part and to allow and pay a part, making of the transaction a partial settlement. The requirement in such a case that the claim be stated on the basis on which it can be paid in full has also been cited. Yet, the adopted method, if recognized as effective for the intended purpose, does in fact, and that purpose is expressed in the protest, convert the claim into a claim for partial payment and put the disbursing officer in the position of doing the very thing which it is recognized he could not do in regular course.

All claims were required to be submitted on approved forms, forms which had back of them the authority of law and the right to prescribe their use for the intended purposes. There were voucher forms for the submission of claims for transportation where full commercial rates were claimed upon the face of which their nature [fol. 24] and use was indicated by the words "No land grant involved." They were intended to be and were used where the claimant was asserting a right to compensation at full commercial rates, and they were not used and could not be used to procure a settlement by a disbursing officer in cases where he could or would pay only land-grant rates. If presented to a disbursing officer for payment under such circumstances, and the claimant was not willing to restate its claim on the basis on which it could be paid by the disbursing officer, it became his duty to transmit the claim for direct settlement by the auditor without making any payment thereon at

all, for he could not on such a voucher pay the amount due at land-grant rates and leave an unpaid balance over. He could not settle in part a disputed claim, but must send it where there was authority so to do. His settlement must be a clean-cut settlement of the whole claim as presented or nothing. If, with full knowledge of all these facts—and knowledge thereof has never been disputed by any railroad company with whose claim we have had to do—a railroad claimant presents its claim on a land-grant voucher at land-grant rates, certified by it to be correct, for the purpose of procuring payment at the hands of a disbursing officer, is it possible that it can of its own motion, by an unauthorized indorsement on an official voucher, convert it into a claim for full commercial rates and make of it in effect just such a claim as the disbursing officer had no authority to settle? Such a right, if a claimant had it, would permit it to subvert the whole prescribed system of settlement and accounting and to make of an official voucher something else than that which by authority of law it is prescribed to be. And, if so, must be held effective for that purpose without presentment, in connection with a claim, to any one having authority to consider disputed claims; for the vouchers upon which they appeared were defunct, as claims, when paid by the disbursing officer, could not go to the accounting officers for further allowance thereon as claims and served only as vouchers to support the disbursing officer's claims in his account current for credits in the amounts thus shown to have been paid by him out of the funds for which he was accountable.

And it may be added that no act of a disbursing officer outside of his authority could create any liability against the United States which did not otherwise exist or abrogate any existing right, and payment by him of a voucher bearing such a protest could under no circumstances be construed as a recognition on the part of the United States of a right to make further claim for the same service. He had no such authority. Nor could the claimant create for itself any right by attempted departure from established methods. The law gave to the Comptroller of the Treasury power to prescribe forms and to regulate the methods of expending and accounting for public funds and conditions imposed by him within the proper exercise of his prerogatives were as if prescribed by the law itself and protest can not in any manner circumvent statutory conditions. In Dowdy, Exx., v. United States, 23 Ct. Cls. 97, interpreting an act authorizing payment of certain claims allowed by the accounting officers but providing that such payments should be accepted as a full and final discharge of the claims, it was said, "The fact that the money was received under protest, although no receipt was re-
[fol. 25] quired except the necessary indorsement of the Treasury check, indicates that the claimant understood the statute as we understand it, and endeavored by a protest to avoid it," a suggestion peculiarly applicable to our interpretation of a disbursing officer's voucher, and later it is said, "No effect can be given to the protest," referring, of course, in that case to the terms of the act, but applicable, we think, to a condition here of equal force.

In Savage, Executrix, v. United States, 92 U. S. 382, we find

many pertinent statements, some of them very much in point on questions already discussed. Savage had purchased $15,000 of Treasury notes represented by a special agent of the Treasury Department as payable in gold but held by the Secretary of the Treasury, at time of payment, as not so payable but payable in currency. Gold was then worth a premium of 32 cents. It is said that there was an honest difference of opinion, Savage contending for payment in gold while the Secretary refused to make payment otherwise than in currency, and so informed him. Savage sent his Treasury notes to his banking representatives in Washington and they were presented at the Treasury Department and gold demanded in payment which was refused. Savage then instructed his bankers to accept payment in currency and surrender the notes, but with instructions to first demand payment in gold, but if refused to accept payment otherwise than in gold under protest. The bankers presented the notes and asked for payment in gold which was refused, and they thereafter, by a communication in writing, in which they recited the presentation of the notes with a request for payment in gold and on refusal, presented them for payment "in accordance with the terms proposed by the Treasury Department," but stating also that "at the same time we beg, under our instructions, to enter protest against payment otherwise than in gold."

The decision of the Supreme Court was on appeal from this court where the administratix of Savage had sought to recover the difference between the value of the currency in which payment was made and gold, the right to receive which was asserted. In the Supreme Court questions presented in this court upon which the decision against the plaintiff was predicated were disregarded and the case turned upon the final transaction of the surrender by Savage of the Treasury notes and the receipt of payment therefor in currency even though accompanied by a protest. Much stress is laid upon the actual surrender of the Treasury notes by Savage, referred to as a condition precedent to his right to receive payment, but the stressing of the surrender of the notes was but the natural basis of the reasoning of the court, under the circumstances of that case, and does not seem to us to detract from the force of the principles stated as applicable to the transaction. In fact the surrender of the notes would not seem to differ so materially from the presentment of a proper disbursing officer's voucher as to change the conclusion to be reached as to the effect of an accompanying protest in either case. The Treasury notes held by Savage and presented for payment were the evidence that he was a creditor of the United States in return for which he received $15,000 of principal in currency because the Secretary refused payment in gold worth $19,800 to which he asserted he was entitled, and endeavored by protest to preserve an asserted right to an additional payment of $4,800 representing the [fol. 26] difference in value between what he asserted he was entitled to receive and what the Secretary was willing to and did pay. The difference was a difference in medium but it necessarily resolved itself into a difference in dollars measured by legal tender currency and upon such a demand was the suit predicated. The plaintiff's

vouchers in this case represented its claims as a creditor of the United States because of services rendered and if stated and presented for payment at land-grant rates, even though it deemed itself entitled to other and higher rates, because it had been informed that the disbursing officer had refused and would refuse to pay more, it would seem to be in the same position as Savage when he presented his notes for payment in currency and received payment in currency, a lesser value than he claimed, because he had been informed that the Secretary would not pay otherwise. And it would seem that a properly stated voucher, certified and paid, was as full an acquittance of the United States as to the claim stated therein as was the surrender of the Treasury notes, for it must be conceded, because so decided, that all vouchers involved in this case, so stated, certified and paid, if without protest, would preclude further recovery for the same service. Can a protest, then, avail in the one case when it was held to be ineffective in the other?

The opinion is replete with apt statements, addressed, of course, in many instances, to the fact that the Treasury notes were voluntarily surrendered, but stating conclusions as clearly applicable here, since, as we have already pointed out, the plaintiff's statements of its accounts at land-grant rates and acceptance of payment on that basis was clearly voluntary. Since it is a matter of common knowledge that disbursing officer's settlements secure more prompt payment than otherwise and that this is the reason for resorting thereto in cases like this the following language is pertinent:

"Prompt payment, no doubt, was desired; but the decedent was under no legal compulsion to accept any other medium of payment than that which he demanded. Both he and his agents were doubtless convinced that the secretary would not recede from the position he had taken; but he was at perfect liberty to reject the terms proposed and to refuse to surrender the overdue securities which he held."

And summarizing the case with a reference to the effect of the protest, it is said:

"Taken as a whole, the findings of the court below show beyond all doubt that the decedent, voluntarily and with a full knowledge of all the circumstances, elected to accept payment of the Treasury notes in the manner proposed by the secretary, and that the surrender of the same to the United States was absolute and unconditional. Nothing less can be inferred from the communication of his agents inclosing the securities when the same were transmitted for redemption, in which his agents say that they 'present the notes for payment in accordance with the terms proposed' by the department. Such an acceptance, if intended to waive every variation from the terms antecedently demanded, could hardly be more complete or explicit; nor is its real character changed in any respect by the fact that the agents asked leave in the same communication 'to enter protest, under their instructions, against payment otherwise than in gold."

[fol. 27] Reverting to our discussion of the form, purpose, and

authoritative character of these disbursing officers' vouchers as stated, presented, and paid in this case, we can not but conclude that their real character was not changed in any respect by the attached protest.

Very forcible and peculiarly pertinent is the language of Justice, afterward Chief Justice, White, speaking for the Supreme Court in International Contracting Company v. Lamont, 155 U. S. 303 at 310, where, referring in general terms to the efficacy of a protest, it is said: "A party can not avoid the legal consequences of his acts by protesting at the time he does them that he does not intend to subject himself to such consequences." The legal consequences of the presentment of these claims to the disbursing officer as they were presented without protests thereon and receipt of payment of the amount claimed have been determined by this court with the approval of the Supreme Court in cases cited. They precluded further recovery. From such consequences resulting from its own acts the plaintiff may not relieve itself by protesting that it didn't mean it.

There is another condition bearing upon plaintiff's claims herein, and particularly, it seems to us, upon the question of protest which, while sometimes suggested in other cases, has never received any lengthy consideration. It is observed that under some decisions of the Comptroller of the Treasury involving payment to land-grant railroads for the character of transportation here involved it has not been specifically held that classes of persons under consideration were essentially "troops" of the United States, but the holding has been that the transportation companies were not entitled to be paid therefor more than land-grant rates.

This holding has been predicated upon provisions found in the Army appropriation acts under the subhead "Transportation of the Army and its supplies," which provisions were repeated in all of such appropriation acts during the period here involved and for a number of years theretofore. The appropriation act for the fiscal year 1914, beginning July 1, 1913, 37 Stat. 715, appropriated under the subhead stated, "For the transportation of the Army and its supplies; * * * for transportation of recruits and recruiting parties; of applicants for enlistment between recruiting stations and recruiting depots; for travel allowance to enlisted men on discharge; of persons on their discharge from the United States military prison or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, * * * 'for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land grant acts), but in no case shall more than fifty per centum of full amount of service be paid: Provided, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large and shall be accepted as in full for all demands for such service:'" followed by a further proviso limiting payments to land-grant roads in the expenditure of the money appropriated by the act and providing again that "the amount

so fixed to be paid shall be accepted as in full for all demands for such service."

[fol. 28] The tendency of Congress seems to have been to gradually provide for the payment of the classes of transportation under consideration here out of this appropriation and subject it to the limitations thereof. Some time before the period in question the transportation of applicants for enlistment had been payable out of another appropriation, and previous to the fiscal year of 1914 travel allowance of discharged soldiers was provided for by a separate item found in Miscellaneous Provisions in the Army Appropriation Acts, and for the first time was brought within the provisions for the transportation of the Army and its supplies on the passage of the act referred to for the fiscal year 1914.

It is the matter of transportation of discharged soldiers with which we are particularly concerned. In view of what has already been said with reference to the situation during the third period here involved and in that connection, it is not inappropriate to suggest that while the appropriation in terms "for travel allowance to enlisted men on discharge" implies a payment to be made to the enlisted men, the law had authorized and it was the practice to furnish to the enlisted man, in lieu of a part of his travel allowance, transportation in kind which is evidenced by a transportation request issued to him and finally made the basis of a claim by the transportation company for the transportation furnished upon that request.

The particular matter for consideration is, of course, the effect of the limitation put upon the expenditure of the funds appropriated for this particular purpose by this act. It is limited to fifty per cent of commercial rates, or, in other words, limited to payment at land-grant rates, with the specific provision that payment so made must be accepted as in full for the transportation furnished. With the provisions of this act the transportation companies are, of course, chargeable with knowledge, a knowledge which they, no doubt, possessed in fact, and it would seem that it must necessarily follow that when a transportation company presented to a disbursing officer a claim for transportation which it knew, or at least was presumed to know, was payable out of this particular appropriation, and could not be paid out of any other, it must subject itself to the limitations of the act and be chargeable with the acceptance of the amount paid as in full. In Dowdy, Executrix, v. United States, supra, involving a payment under a statute providing that the amount paid should be accepted as a full and final discharge of the several claims examined and allowed by the accounting officers, in which case it was sought to preserve a further right by a protest, it was said:

"No effect can be given to the protest. The act prescribed the only terms upon which payment could be tendered or received. It is very clear to the court that a party accepting money under positive statutory conditions can not vary the conditions by merely protesting against them. Acceptance of the money is necessarily an agreement to the terms. Cape Ann Granite Co. v. The United States, 20 Ct. Cls. R. 1; Savage v. The United States, 92 U. S. R. 382."

If it be said that the provisions of this act may not be here invoked against the plaintiff because it has been held that the classes of persons here involved are not "troops" of the United States, it is sufficient to say that for transportation purpose at least Congress saw fit to so treat them, and by making their transportation payable out of this particular appropriation it necessarily made these payments [fol. 29] subject to the conditions attached to the expenditure of the moneys appropriated for that purpose. It is not necessary to hold that the limitations of that act could effect or alter the right of this court to adjudge whatever compensation it might deem railroad companies entitled to for this class of transportation. The effect of the act manifests itself not upon the jurisdiction of this court but upon the transaction as between the claimant and the disbursing officer at the time of the presentment and payment of a claim payable out of the moneys appropriated by this act and subjects the claimants to the limitations prescribed, necessarily precluding any further recovery by reason thereof.

The question herein presented and discussed was not involved in the Union Pacific case, wherein the status of these various classes of persons was considered and determined. It is noticeable that in that case, which was prepared for the purpose of testing the status of these classes of persons as "troops" of the United States and which was prepared during the period covered by the transactions here involved and by the same attorney representing that plaintiff and this, and which was based upon transportation furnished during 1913, 1914, and 1915, reliance was not on "protested" disbursing officer's vouchers but upon claims for full commercial rates presented to the auditor for direct settlement, upon settlement of which that official disallowed and deducted land grant, a procedure entirely within his proper powers, against which deduction the plaintiff protested and appealed to the Comptroller of the Treasury and thereafter brought its suit for the amounts disallowed by the auditor, viz., the difference between the amount claimed and the amount allowed. The distinction is manifest.

The views expressed require the conclusion that the plaintiff is not entitled to recover as to either of the periods considered. A dismissal of its petition has therefore been directed.

Reference is made to the opinion by the Chief Justice discussing practically the same question in case No. 30-A, Western Pacific Railroad Company, this day decided.

Graham, Judge; Hay, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 30] XIII. JUDGMENT OF THE COURT

At a Court of Claims held in the City of Washington on the Seventh day of January, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendant, and do order, adjudge and decree that the plaintiff,

as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the United States; and that the petition herein be and the same is dismissed: And it is further ordered, and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of Three hundred and twenty-seven dollars and eight cents ($327.08), the cost of printing the record in this Court, to be collected by the Clerk, as provided by law.

By the Court.

XIV. Plaintiff's Application for Appeal—Filed January 22, 1924

From the judgment rendered in the above-entitled cause on January 7, 1924, plaintiff hereby makes application for the allowance of an appeal to the Supreme Court of the United States.

Harr & Bates, Attorneys for Plaintiff.

XV. Order of Court Allowing Plaintiff's Application for Appeal—Entered February 4, 1924

It is ordered by the court that the plaintiff's application for appeal be and the same is allowed.

By the Court.

[fol. 31] Court of Claims of the United States

[Title omitted]

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the arguments and submissions of case; of the findings of fact, conclusion of law, and opinion of the court by Downey, J.; of the judgment of the court; of the plaintiff's application for an appeal; of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Eighth day of February, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,120. Court of Claims. Term No. 810. Southern Pacific Company, appellant, vs. The United States. Filed February 11th, 1924. File No. 30,120.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

No. 285.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

SOUTHERN PACIFIC COMPANY, *Appellant,*

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Appellant.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

No. 285. October Term, 1924.

Southern Pacific Company, *Appellant*,

vs.

The United States.

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

Statement of the Case.

The Southern Pacific Company sued in the Court of Claims to recover certain amounts, required (by the decisions of the Comptroller of the Treasury in effect at that time) to be deducted on account of "land grant," as for "troops of the United States," in the bills or vouchers rendered by plaintiff to a disbursing officer of the United States, for the transportation, between March 1, 1912, and June 18, 1916, of (1) applicants for enlistment in the Army (accepted and rejected), (2) discharged military prisoners, (3) discharged

soldiers, (4) retired soldiers, (5) furloughed soldiers, and (6) civilian employees of the War Department.

Some other classes of persons were also included in the petition, as amended, but appellant subsequently waived its claim as to them, without conceding the principle involved. (Finding of Fact X, Rec., 8.) Appellant also eliminated from its claim land-grant deductions made subsequent to June 18, 1916, when a special agreement between the railroads and the Government as to the transportation of the aforesaid classes of persons was in force. (*Ib.*)

In *Union Pacific Railroad Company* v. *United States* (52 C. Cls. 226; affirmed 249 U. S. 354), it was held that none of the first five of the above mentioned classes of persons were "troops of the United States" within the provisions of the railroad land-grant Acts of Congress requiring reduced rates for the transportation of troops and property of the United States. And the Court of Claims, in its opinion in this case, also holds that "civilian employees of the War Department" are not "troops of the United States" within the meaning of the railroad land-grant Acts (Rec., 10), the Attorney General and the Comptroller General having reached a like conclusion as to said persons since the Union Pacific Case was decided (1 Comp. Gen. 233; 33 Op. A. G., 40). So that the status of such persons is not in dispute on this appeal.

The findings of fact made by the Court of Claims (Rec., 5-9), show that prior to January 1, 1914, appellant rendered its bills for the transportation of the aforesaid six classes of persons, upon the prescribed form of Government voucher, to the Depot Quartermaster of the Army at San Francisco (the disbursing

officer of the Government authorized to pay such bills), at the reduced fares applicable to troops of the United States, without any specific protest against being required to make such deductions; but that, beginning January 1, 1914, appellant wrote or stamped on its bills for the transportation of said six classes of persons, rendered to the Depot Quartermaster of the Army at San Francisco, the following form of protest:

> "Amounts claimed in this bill accepted under protest."

The Court of Claims further found that, beginning October 1, 1914, appellant "systematically" typed on its bills a longer and more explicit form of protest, reading as follows:

> "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S., such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed."

The Court of Claims—while recognizing that, prior to the times referred to herein, the Comptroller of the Treasury had ruled that said several classes of persons were to be regarded as "troops of the United States," and that the disbursing officer could only pay plaintiff for such transportation the amount authorized by the decisions of the Comptroller of the Treasury—held, that appellant was not only *not* entitled to recover the amount of such deductions where it had accepted payment on a land-grant basis without pro-

test, *but also that it was not entitled to recover the amounts so required to be deducted even though appellant's bills for such transportation were rendered to the United States disbursing officer under specific written protest against the acceptance of payment on such basis, in the form and manner above set forth.* It therefore dismissed the petition, and the company appealed to this court.

The total amount of land-grant deductions involved in this case, as finally presented to the Court of Claims, is $186,282.20. Of this amount $39,253.54 occurred prior to January 1, 1914, when appellant began to accept payment on a land-grant basis under protest; $71,560.92 occurred between January 1, 1914, and October 1, 1914, when the short form of protest was being used, and $75,467.74 between October 1, 1914, and June 18, 1916, when the long form of protest was used. (Findings of Fact VII, VIII and IX, Rec. 7-8.)

ARGUMENT.

I.

Issues Presented on This Appeal.

In view of the findings of fact made by the Court of Claims, counsel for appellant recognize that, under the doctrine announced by this court in *Oregon-Washington Railroad & Navigation Company* v. *United States* (255 U. S. 339), appellant may be held to have "conceded" the land-grant rate as to all transportation occurring between March 1, 1912, and January 1, 1914, because of its having presented its bills on the land-grant basis without protest or other objection (except one bill for transportation performed in September, 1913, which bore the short form of protest, and in-

volved deducted land-grant to the amount of $294.06, as set out in Finding of Fact IX. It is probable that this bill was rendered after January 1, 1914).

As to all transportation of the character referred to herein occurring after January 1, 1914, involved in this suit, appellant contends that it is entitled to recover the balances deducted on account of land-grant because, on and after that date, the Government was fully advised that appellant was accepting payment for such transportation on a land-grant basis *under protest*. In any event, appellant should be held entitled to recover as to the items specifically protested.

The gist of the opinion of this court in the *Oregon-Washington Case* is that the circumstances thereof implied a "concession" by the railroad company of the land-grant rate, although the property transported was not property of the United States. This distinctly appears from the following statement in the opinion (255 U. S., at pp. 339, 347-8):

> "These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the *concessions of appellant to the action of the accounting officers,*" etc.

We submit that the circumstances of this case, as disclosed by the record herein, absolutely negative any intention on the part of the plaintiff company to "concede" the land-grant fare as to the classes of persons referred to herein after January 1, 1914. Not only does the record show that the plaintiff, from that date, attached specific protests to its bills in a sufficiently large number of cases to show that it was not "con-

ceding" the land-grant deductions, but as the Court of Claims also finds (Finding of Fact XI, Rec., 9):

> "At some time in the latter part of 1914, the Union Pacific Railway Company, *which was then represented in Washington in the matter of claims against the Government by the same attorney who represented the plaintiff company in the same capacity,* presented its claim to the Auditor for the War Department for the transportation at regular published passenger rates of certain rejected applicants for enlistment, discharged military prisoners, discharged enlisted men, retired enlisted men, and furloughed men returning to their stations, which the auditor disallowed to the extent of the applicable land grant, and upon appeal to the Comptroller of the Treasury, the Comptroller, on March 24, 1915, affirmed the action of the auditor.
>
> Thereupon that company commenced its action in this court (case No. 3305) on April 29, 1915, which was decided by this court February 19, 1917 (52 Ct. Cl. 226), and on appeal affirmed by the Supreme Court (249 U. S. 354)."

And on March 1, 1918, after the affirmance of said Union Pacific case by this Court, the Southern Pacific Company, through the same attorney, filed this suit in the Court of Claims (Rec. 1, 3).

In other words, the Union Pacific case was prosecuted as a "test" case before the Treasury Department and in the Court of Claims by the attorney at Washington, of counsel here, who was representing both that Company and the Southern Pacific Company in the matter of claims against the Government. And it appears from the opinion of the Comptroller of the Treasury in the Union Pacific case that that decision

had reference to transportation occurring during the fiscal year July 1, 1913, to June 30, 1914 (21 Comp. Dec. 651). In order to reopen this question before the accounting officers, it also appears from said opinion, the Union Pacific Company presented its bills for the transportation referred to therein at full commercial fares. That appellant did not follow that course during the same period was doubtless due to the fact that it thought such an appeal to the accounting officers of the Government would be of no avail—and the event showed that this supposition was correct. Appellant contented itself, therefore, during said period, and until the Union Pacific case was decided by the Court of Claims, with presenting its bills at land-grant rates and accepting payment at such rates under protest, so as to preserve its right to sue in the Court of Claims for the land-grant deductions.

The case of *Western Pacific R. R. C.. United States* (No. 287 of this term), also before this court on appeal from the Court of Claims, shows that other railroad companies were also following the same practice of rendering their bills, to disbursing officers, for the transportation of the several classes of persons involved herein, upon a land-grant basis, under protest. That case covers transportation between September, 1914, and June 18, 1916.

II.

As to the Sufficiency of the Short Form of Protest.

The short form of protest, written, typewritten or stamped upon plaintiff's bills or vouchers, read:

"Amounts claimed in this bill accepted under protest."

(Findings of Fact VI, Rec. 6.)

The Court of Claims holds this form of protest insufficient on the ground that it did not sufficiently advise the disbursing quartermaster of the Army at San Francisco, to whom all of said bills or vouchers were presented, and by whom they were all paid, what the plaintiff was protesting against. This view cannot, we submit, be sustained in view of the Court's own findings.

In Finding of Fact V the court states (Rec. 6):

> "For all such transportation plaintiff stated its bills on the prescribed form of voucher for transportation subject to land-grant deductions, stating therein in appropriate columns the mileage of land grant road, the number of men, the rate per man, the gross amount, the 'amount to be deducted on account of land-grant' and in the final column the 'amount claimed' which was the gross amount less land-grant deduction, and certified the account as stated to be correct."

As, according to these findings, it appears that the "amounts claimed" in said bills or vouchers were the amounts due on a land-grant basis, it would seem apparent, without any further explanation, that what the Company was accepting, under protest, was payment upon that basis. *On the face of the bills as rendered,* according to the findings, there was nothing else that the protest could apply to.

Any possible doubt on this subject would seem to be removed by the further finding of the Court of Claims that "the short form" of protest was under-

stood by the clerk who handled these bills in the office of the disbursing quartermaster at San Francisco (who was "head clerk" in that office for part of the time, Rec. 15), "*as addressed to the matter of land-grant rates and to be for the purpose, on the part of the plaintiff, of reserving a right to present a further claim for full commercial fares to the accounting officers or the courts.*" (Finding of Fact VI, Rec. 6-7.)

In discussing this matter in its opinion, the Court of Claims seems to think that this understanding of the clerk in the disbursing quartermaster's office at San Francisco who handled these bills, as to what was meant by the short form of protest, cannot be imputed to the disbursing quartermaster himself (Rec. 15); but since the disbursing quartermaster was acting in this matter through said agent, we think it follows, as a matter of law, that the understanding which this agent had as to the purpose of the protest is to be imputed to that official.

It is also to be noted that, as the Court of Claims further states, in its opinion, the "passenger rate clerk on the transportation rate board in the General Accounting Office," whose duty it was to audit such bills, when questioned about the matter, testified that "it was his understanding that in using such form of protest the plaintiff company was protesting against making any land-grant deduction." (Rec. 14.) All of which goes to show that it was perfectly apparent from the way the bills were rendered that the company was protesting the requirement of land-grant deductions.

In any event, this short form of protest was sufficient to advise the disbursing quartermaster that the reduced amounts claimed (whatever the specific

ground of objection) were not being accepted as in full for the service performed, and thereby a "concession" of the land-grant fare was absolutely negatived.

The Court of Claims calls attention to the fact that between January 1, 1914, and October 1, 1914, when the short form of protest was being used, a very large number of plaintiff's bills for this class of transportation bore no protest. But the fact that 201 vouchers, involving over $24,000 of land-grant, were protested during this period was certainly sufficient to put the office of the disbursing quartermaster at San Francisco on notice that the plaintiff was not "conceding" the land-grant rate, *and that was the only purpose to be subserved by such protests.* Any failure to physically file protest in a particular case would not impair this purpose.

From the very first protest of this kind, the disbursing quartermaster (as the agent of the Government) was put upon notice that the plaintiff was insisting upon payment at full commercial fares upon these classes of transportation, and unless an abandonment of such claim is to be inferred from its subsequent action, the land-grant rate is not to be held to have been conceded. So far from abandoning its claim, the findings show that the plaintiff continued thereafter to protest these payments with increasing regularity and particularity.

In the *Railway Mail Service Cases* (103 U. S. 703, affirming 13 C. Cls. 199), the right of the railroads to recover a statutory rate of compensation for the transportation of the mails, was held to date from the time protest was first made. And so, we submit, in this case, the plaintiff is entitled to recover the balances due on account of land-grant deductions (required, as found

by the Court of Claims, by the decisions of the Comptroller of the Treasury) on all such bills rendered subsequent to January 1, 1914, when it began to register its protest against the requirement of land-grant deductions upon the face of the bills or vouchers which it presented to the Government disbursing officers. On and after that date, no "concession" of the land-grant fare can, under the circumstances of this case, be fairly implied.

This is manifestly a very different case from the *Oregon-Washington case, supra,* because in that case said company, during the entire period covered by that suit, presented its bills at land-grant rates, and accepted payment at such rates, *without any protest whatsoever.* In other words, in that case, *down to the filing of that suit,* there was a long and unbroken period of acquiescence on the part of the carrier in the view that the household goods of Army officers changing station, within their change of station allowance, were subject to land-grant deductions. But here, beginning January, 1914, there was continuous insistence by the carrier that it was entitled to full commercial fares for the transportation of the several classes of persons referred to herein.

That the protest was omitted from a number of the bills was manifestly a clerical neglect and could not have misled the disbursing quartermaster at San Francisco who paid all said bills and who was the authorized agent of the Government in this matter.

It is also to be borne in mind, in this connection, that, as found by the Court of Claims:

> "At various times prior to the furnishing of the transportation here involved the Comptroller of

the Treasury had held that the land-grant railroads could be paid for the transportation of the classes of persons enumerated in the *Union Pacific Case, supra,* only at land-grant rates and disbursing officers were authorized to make payment on that basis only." (Finding of Fact XI, Rec. 8-9.)

As a matter of fact, the Comptroller of the Treasury had gone even further, and, at and prior to the transportation referred to herein, "the established construction" of the railroad land-grant Acts was "*that the term 'troops' as used therein applies to all persons for whom transportation is required by the United States in connection with its military service,*" including civilian employees and agents. (Decision of Comptroller Downey of March 24, 1915, 21 Comp. Dec. 651, 657, and former Comptrollers' decisions therein cited.)

The Court of Claims recognizes that it was the duty of the disbursing quartermasters of the Army to keep themselves advised as to the Comptroller's decisions, (whose decisions are, by Sec. 8 of the Dockery Act, 28 Stat. 207, made "final and conclusive upon the Executive branch of the Government"), and to pay no more for *Army transportation* than those decisions would permit.

III.

The Long Form of Protest.

Beginning with October, 1914, according to the findings of the Court of Claims, plaintiff began "systematically" to type on its bills the long form of protest (Finding of Fact VIII, Rec. 7). Said protest read:

> "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S. such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed." (Finding of Fact VI, Rec. 6.)

The Court of Claims, in its opinion, says that this protest is specific enough, but that it must be limited to "discharged soldiers," "the class, however, which involves the larger part of the claim" (Rec. 17). We submit that this is a very narrow construction of the protest.

Certainly, this protest, when attached to bills, rendered on a land-grant basis, for the transportation of applicants for enlistment and other persons not part of the "troops of the United States," was entirely adequate and sufficient to put the disbursing quartermaster on notice that plaintiff was stating said bills on such basis under protest. It could have no other meaning when attached to such bills.

What said protest says, is that "such fares," *i. e., land-grant fares*, are shown, in said vouchers, under protest, etc., giving as a reason therefor the fact that the Government accounting officers have held that they have no authority to allow or pay for the transportation of discharged soldiers (*i. e.*, persons not in the military service of the United States) more than the fares for troops of the United States.

Furthermore, as above shown, prior to the adoption of this long form of protest, plaintiff had been accepting payment of all of the several classes of transpor-

tation referred to herein on a land-grant basis, under protest, so that the disbursing quartermaster at San Francisco, to whom all such bills were presented, could have had no misunderstanding about the matter.

IV.

Powers and Duties of the Disbursing Quartermaster of the Army Who Paid the Bills Here in Question.

The powers and duties of the disbursing quartermaster of the Army at San Francisco, who paid the bills here in question, are of some importance in this case because the Court of Claims goes on to hold, in its opinion, that no protest, no matter how specific, against the requirement of land-grant deductions, attached to the vouchers presented by plaintiff to such officer, would have been sufficient to preserve the plaintiff's right to bring suit in that court for the amount of such deductions. (See Opinion, Rec. 16.)

The theory of the court, as expressed by Judge Downey, seems to be that, because a form of voucher has been prescribed by the Comptroller of the Treasury, under the authority of law, a railroad company that uses that form and certifies that the amount claimed is "correct and just," is precluded from thereafter claiming any other amount.

The statute referred to by the court is Sec. 5 of the Dockery Act (28 Stat. 206), which provides:

> "Sec. 5. The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom."

There is nothing in this statute, however, or in the form of voucher prescribed by the Comptroller of the Treasury referred to in this case, which precludes a railroad company from rendering its bills for Government transportation on a land-grant basis, under protest, and suing in the Court of Claims for the balances claimed to be due, where, under the rulings of the Comptroller of the Treasury (whose decisions are made binding upon the Executive branch of the Government by section 8 of the same Act), that is all that the Government will pay. On the contrary, under such circumstances, that would be the most natural and obvious thing to do, since it would be useless, under such circumstances, to claim the full commercial fares, as the only result of doing so would be to delay the payment of such parts of the amounts as, under the Comptroller's decision, could be lawfully paid by the Executive branch of the Government.

The certificate of the appellant that the account as stated was "correct and just," as called for by the prescribed form of Government voucher, is of no importance here. Said vouchers showed the amounts due on a commercial basis, and *also the amount claimed on a land-grant basis under protest*, and the correctness of both amounts so stated is not disputed in this case, nor the justness of the claim as so presented to the disbursing officer.

It is to be remembered in this connection, that the disbursing officers have no authority to pay any greater amount on an account than is unquestionably due under the decisions of the accounting officers of the Government or the Comptroller of the Treasury (now the Comptroller General). (See Decision of Comptroller Tracewell, December 17, 1897, 4 Comp.

Dec. 332). Hence, under the heretofore settled practice, all bills submitted to a disbursing officer must be limited to such amounts and supplemental bills presented to the accounting officers for any additional amount claimed, or suit in court instituted therefor.

The necessary result of the view announced by the Court of Claims in this case would be to prevent payment *by disbursing officers of the Government,* in cases such as that referred to here, of the amounts to which carrier is admittedly entitled, under the decisions of the Comptroller, and to necessitate the presentation of such bills at full commercial fares or rates, to the accounting officers of the Government. In other words, the authority of the disbursing officers will be curtailed *pro tanto,* and for no good purpose, since it would only mean circumlocution and delay in obtaining through the general accounting office what the disbursing officer would have paid in the first instance.

But the power and authority of the disbursing officers, including disbursing quartermasters of the Army, to pay claims against the United States out of moneys in their hands appropriated by Congress for the purpose, *is established by law and cannot be taken away by any action or ruling of the Comptroller of the Treasury or his successor, the Comptroller General.*

This was so held by the Attorney General in an opinion rendered the Secretary of War December 28, 1922 (33 Op. A. G. 383), in considering the scope and effect of a regulation issued by the Comptroller General, in General Regulations No. 13, dated November 25, 1922, requiring among other things that "Beginning January 1, 1923, the claims and demands of common carriers against the United States * * * shall be settled by the General Accounting Office," which reg-

ulation, the Attorney General said, would "not only eliminate all payment of transportation accounts by disbursing officers, but it will also largely eliminate the administrative examination of such accounts which is now made prior to or after payment."

In rendering the opinion just mentioned, the Attorney General said (*ib.*, p. 386):

> "The authority of the General Accounting Office as established by the Act of June 10, 1921, must be construed in the light of the prevailing practice of making payment for departmental expenditures through departmental disbursing officers. That this practice has received legislative sanction is shown by the numerous statutes defining the duties and functions of dsbursing officers."

The opinion of the Attorney General then refers to the statutes governing disbursing officers generally and quotes from several relating solely to disbursing officers of the Army, and concludes that (*ib.*, 388):—

> "The extent and variety of the foregoing legislation convince me that Congress intended, as to the government in general and as to the War Department in particular, that ordinary government payments should be made by disbursing officers."

The Attorney General therefore advised the Secretary of War, in substance, to disregard the aforesaid regulation of the Comptroller General as beyond the scope of his authority, stating that, in his opinion, the Secretary of War would not be justified, by anything in said regulation, "in failing to make, or in permitting or requiring disbursing officers under him to make,

payment as now authorized by law of transportation obligations created by and under authority of the Secretary of War."

Clearly, also, no judicial construction of the powers of the Government disbursing officers with respect to the payment of accounts against the Government, should be adopted which will unnecessarily curtail the authority conferred by law upon them to make what the Attorney General describes as "ordinary Government payments," and particularly payment "as now authorized by law of transportation obligations created by and under authority of the Secretary of War."

V.

SAVAGE, EXECUTRIX, v. UNITED STATES, 92 U. S. 382.

The Court of Claims cites the opinion of this court in the above mentioned case in support of its view that appellant could not preserve its right to payment in full for the transportation here in question by accepting payment from a disbursing officer on a land-grant basis under protest.

We submit that the two cases are materially different.

In the *Savage* case, the holder of the Treasury notes there referred to, while insisting that he was entitled to have them redeemed in gold, accepted payment in currency, as offered by the Secretary of the Treasury, and surrendered the notes. It was therefore held that his protest was ineffectual, because inconsistent with his actions.

It will be noted also that there, the holder of the notes *was paid in full* for the same, though in a dif-

ferent *medium* from that which he thought he was entitled to receive. Here, the carrier has only received *part payment* for the services it performed, and there was no inconsistency in its accepting such *part payment* under protest, the protest being manifestly proper and effective for the purpose of showing that the payment was not being accepted as in full.

VI.

The Procedure Followed by Appellant Was Not in Conflict With Any Departmental Regulation and Had the Approval of the Comptroller of the Treasury.

In the last analysis, the position of the Court of Claims is that there is something in the laws and Departmental regulations which prevent a carrier from accepting part payment of its claims for Government transportation from a disbursing quartermaster, *but that court has failed to point out any such law or regulations.*

As a matter of fact, under the settled practice, payments by disbursing officers for Government transportation, when not received under circumstances which indicate an acceptance in full satisfaction of the claim, have always been regarded by the accounting officers of the Government *simply as payments on account.* This is because, as above stated, disbursing officers had no authority to pay an account in a greater amount than authorized under decisions of the Comptroller of the Treasury. In such cases, the carrier has always been at liberty to present a supplemental bill for the additional amount due it, but if the matter were already concluded against it by the Comptroller's de-

cisions, such a proceeding would be useless and the carrier's remedy has always been by suit in the Court of Claims for the balance.

At the time the practices referred to in this case were going on the Comptroller of the Treasury, in an opinion rendered June 16, 1915 (21 Comp. Dec. 868), distinctly recognized the efficacy of a protest as to the insufficiency of a payment made by a disbursing officer to preserve the right of the carrier to present a claim for an additional allowance. It appears from that opinion that the Louisville & Nashville Railroad Company had billed for a shipment of household goods and professional books of an Army officer upon the basis of the household goods rating and book rating; that it accepted payment upon such basis *without protest*, and that thereafter it presented a supplemental bill to the Auditor for the War Department claiming household goods rating on the entire shipment, basing its claim upon a decision of the Comptroller of the Treasury rendered subsequent to the original payment. In affirming the action of the Auditor in disallowing the supplemental bill, Comptroller Downey said (*ib.*, 869.)

> "Had the claim for service been settled in the first instance by the auditor and properly settled under the decisions then in force, such settlement, unappealed from, would not be opened up because of a subsequent decision changing the rule. *A payment made by a disbursing officer does not stand on the same footing, and the right to file a claim with the auditor for an additional allowance is recognized;* but when service is rendered and payment is made by a disbursing officer in accordance with existing decisions and such pay-

ment is accepted as payment in full, *evidenced by the fact that there is no protest and no claim made for any other or additional allowance,* an attempt thereafter to predicate an additional claim on a subsequent decision changing the rule is not in principle essentially different from an attempt to open an auditor's settlement under the same circumstances."

The clear implication from this opinion of the Comptroller of the Treasury is that payment by a disbursing officer is not to be regarded as payment in full where the amount paid is accepted under protest,—and this although the bill as rendered to and paid by the disbursing officer contained the prescribed certificate of the carrier that the claim as presented was "correct and just."

In the motion to advance which we filed in this case (p. 6), which motion was supported by affidavit, we quoted a letter written by T. F. Powell, Chief, Transportation Branch, of the Finance Department, U. S. Army, under date of August 15, 1923, to Mr. Chas. H. Bates, of counsel in this case, in which was quoted an extract from a letter of the Comptroller General, dated October 9, 1922, addressed to Mr. E. R. Woodson, Secretary of the Railway Accounting Officers Association, in which the Comptroller General said:

> "*The stamping or writing a protest on the original bill and copies thereof does not conflict with regulations of this office,* but if it is desired thereby to have any matter therein considered by this office *where bills are stated by carriers at net fares or charges in accordance with the rulings of this office which the carriers are unwilling to ac-*

> *cept*, there should be set forth the objections to the bills as rendered, and a supplemental bill serves no particular purpose and unnecessarily increases and encumbers the files of this office."

In view of the above statement of the Comptroller General, Mr. Powell, in said letter, said:

> "In all cases where this office and the General Accounting Office are estopped from making payments by decisions of the Comptroller General or his predecessors, it is the opinion of this office that nothing would be gained by submitting supplemental bills *and that the proper procedure would be for the carriers to submit their claims for any additional charges to which they feel they are justly entitled to the Courts.*"

It is apparent therefore that the decision of the Court of Claims in this case is at odds with the views of the Comptroller of the Treasury and his successor, the Comptroller General, as to what the statutes of the United States and Departmental regulations require or permit in respect to the rendition of bills for Government transportation by carriers; that it was and still is entirely proper for the carriers to render, and for the disbursing officers of the Government to accept and pay, bills or vouchers for Government transportation in the reduced amounts which such disbursing officers of the Government could pay, under the decisions of the Comptroller of the Treasury, under protest, made upon the face of such bills or vouchers, and that such procedure would be sufficient to save the carriers' right to sue in the Court of Claims for the balances claimed to be due.

VII.

No Estoppel by Reason of the Restrictive Provisions of the Army Appropriation Acts.

While recognizing that the several classes of persons referred to in this case are not embraced within the term "troops of the United States," as used in the railroad land-grant Acts, the Court of Claims, in its opinion (Rec., 24-26), proceeds to hold that the provisions in the Army Appropriation Acts, beginning with the Act of March 2, 1913, making appropriations for the fiscal year July 1, 1913, to June 30, 1914 (37 Stat. 704, 715-716), restricting payments to land-grant railroads, precludes any further recovery by plaintiff because of its acceptance of payment out of the appropriations made by said Acts, even though such acceptance was under protest against the requirement of land-grant deductions.

In order to sustain this view, the Court of Claims, in its opinion, says (Rec., 26):

> "If it be said that the provisions of this act may not be here invoked against the plaintiff because it has been held that the classes of persons here involved are not 'troops' of the United States, it is sufficient to say that for transportation purposes at least Congress saw fit to so treat them, and by making their transportation payable out of this particular appropriation it necessarily made these payments subject to the conditions attached to the expenditure of the moneys appropriated for that purpose."

Unfortunately, for this view, the Court of Claims is in error when it says that Congress, in the legislation

referred to, has treated the classes of persons referred to herein as "troops of the United States" and made their transportation subject to the conditions attached to the expenditure of the moneys appropriated by said Acts. A careful reading of the provisions referred to make its error perfectly clear.

We quote the following from said Army Appropriation Act of March 2, 1913 (37 Stat. 704, 715-716):

> "TRANSPORTATION OF THE ARMY AND ITS SUPPLIES: For transportation of the Army and its supplies, including transportation of the troops when moving either by land or water and of their baggage, including the cost of packing and crating; for transportation of recruits and recruiting parties; of applicants for enlistment between recruiting stations and recruiting depots; for travel allowance to enlisted men on discharge; of persons on their discharge from the United States military prison or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, or from the Government Hospital for the Insane after transfer thereto from such prison or place, to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment; of supplies furnished to the militia for the permanent equipment thereof; of the necessary agents and other employees; of clothing and equipage and other quartermaster stores from Army depots or places of purchase or delivery to the several pos and Army depots and from those depots to the troops in the field; of horse equipment; or ordnance and ordnance stores, and small arms from the foundries and armories to the arsenals, fortifications, frontier posts, and Army depots; for payment of wharfage tolls and ferriage; for transportation of funds

of the Army; for the hire of employees; for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than fifty per centum of full amount of service be paid: *Provided*, That such compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large and shall be accepted as in full for all demands for such service: *Provided further*, That in expending the money appropriated by this Act a railroad company which has not received aid in bonds of the United States, and which obtained a grant of public land to aid in the construction of its railroad on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval, and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation, having claims against the United States for transportation of troops and munitions of war and military supplies and property over such aided railroads, shall be paid out of the moneys appropriated by the foregoing provision only on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed fifty per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service. * * * "

In reading this section it will be noticed, in the first place, that Congress provides therein (1) "for transportation of the Army and its supplies, including transportation of the troops," etc., and then for the transportation (2) "of applicants for enlistment between recruiting stations and recruiting depots;" (3) "for travel allowance to enlisted men on discharge;" (4) "of persons on their discharge from the United States military prison," etc., and (5) "of the necessary agents and other employees."

Here then, at the outset, is a differentiation in these Army Appropriation Acts between troops and persons who have ceased to be or never were troops. This differentiation, as embraced in earlier Army Appropriation Acts, was referred to by Mr. Justice Brandeis, in delivering the opinion of this court in the Union Pacific case (249 U. S. 354, 358).

In the next place, the restrictive provisions which the Appropriation Act of March 2, 1913, then proceeds to impose upon the use of the moneys appropriated by said Act for the payment of land-grant railroads for Army transportation, are in fact limited to the transportation of troops and property of the United States over such roads.

The first restrictive provision in said Army Appropriation Act is:

> "for the payment of Army transportation lawfully due such land-grant railroads as have not received aid in Government bonds (to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts), but in no case shall more than fifty per centum of full amount of service be paid": *Provided,* "That such compensation shall be computed

> upon the basis of the tariff or lower special rates for like transportation performed for the public at large and shall be accepted as in full for all demands for such service:"

It is necessary to consider the parenthetical statement, in this provision, "(to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts,)" in order to understand the extent of the restrictions thereby made. The decisions of the Supreme Court referred to were, *Lake Superior and Mississippi Railroad Company* v. *United States,* and *Atchison, Topeka and Santa Fe Railroad Company* v. *United States,* decided at its October Term, 1876 (93 U. S. 442), in which cases it was held, as stated in the headnote to the opinion:

> "A provision in an act of Congress, granting lands to aid in the construction of a railroad, that 'said railroad shall be, and remain, a public highway for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or *troops* of the United States,' secures to the Government the free use of the road, but does not entitle the government to have *troops* or property transported over the road by the railroad company free of charge for transporting the same."

This court therefore held that the railroad companies referred to were entitled to receive "compensation for all transportation performed by them, respectively, of troops and property of the United States (excepting the mail), subject to a fair deduction for the use of their respective railroads."

It appears therefore that the only reservation made by this class of Acts, to the United States, was the

privilege only of a "free highway" for the transportation of "troops and property of United States." So that the restrictions in the Army appropriations as to the payment of this class of railroads for Army transportation must be confined to the transportation of "troops and property of the United States."

Subsequent to the above-mentioned decisions of this court, the War Department agreed with the Atchison, Topeka & Santa Fe Railroad Company upon 33-1/3% as a fair deduction to be allowed by the Government on account of the statutory reservation as to the free use of the land-grant highway of its road with respect to transportation of troops and property of the United States occurring between March 31, 1874 and April 1, 1875; the Department later tried to avoid this agreement, and in a suit concerning the matter the Court of Claims decided that said deduction of 33-1/3% was a fair and reasonable one, indeed, intimating that but for said agreement "the deduction which would be made would fall short of that agreed upon, and the defendants be liable for a heavier judgment than that which they are seeking to set aside." (*A. T. & S. F. R. R. Co.* v. *United States*, 12 C. Cls. 295, 304.)

When, therefore, Congress, after this last-mentioned decision of the Court of Claims, in the Army Appropriation Acts, provided for the payment of land-grant rates for Army transportation, "to be adjusted in accordance with the decisions of the Supreme Court in cases decided under such land-grant Acts," but that "in no case shall more than *fifty* per centum of full amount of service be paid," it presumably had in mind the ruling of the Court of Claims that 33-1/3% was a reasonable allowance to the Government for the "free highway" privilege which it had reserved in

this class of railroad land-grant Acts "for the transportation of any property or *troops* of the United States," and intended only to foreclose suit in that court for any greater amount for *such* transportation.

Clearly, Congress was not, in said statutes, attempting to stipulate that land-grant railroads of this class should only receive fifty per centum of the full amount of the service with respect to *all* transportation service performed by it for the War Department, regardless of whether or not the persons or property transported were "troops and property of the United States."

That Congress, in said restrictive provisions of the Army Appropriation Acts, was only fixing a maximum compensation of fifty per centum of the commercial rates for the transportation of *troops* and property of the United States over any such railroad is further apparent from the next proviso in said Army Appropriation Act with reference to railroad companies which had obtained a grant of public land to aid in the construction of its railroad "on condition that such railroad should be a post route and military road, subject to the use of the United States for postal, military, naval and other Government services, and also subject to such regulations as Congress may impose restricting the charge for such Government transportation." Said statutes refer to claims of the latter class of railroads against the United States "for transportation of *troops* and munitions of war and military supplies and property over such aided railroads," and provide that they "shall be paid out of the moneys appropriated by the foregoing provision only on the basis of such rates for the transportation of *such troops* and munitions of war and military sup-

plies and property as the Secretary of War shall deem just and reasonable under the foregoing provision," adding "such rate not to exceed fifty per centum of the compensation for such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service."

Referring to these restrictive provisions of the Army Appropriation Acts, the Comptroller of the Treasury, in a decision rendered January 22, 1919 (25 Comp. Dec. 520, 523), said:

> "It appears to have been the practice, without any definite determination by the Secretary of War of what rate should be deemed just and reasonable, to adopt the authorized maximum of 50 per cent of tariff rates as the basis of settlement for the transportation of property and *troops* of the United States over said railroads.
>
> It appears to have been the purpose of Congress, *though with slightly different form of language*, to authorize the payment of transportation of property and *troops* for the United States over both these classes of land-grant railroads *on the same basis*, unless otherwise determined by the Secretary of War, as provided for the second class of roads."

We submit therefore that the Court of Claims erred in holding that these restrictive provisions preclude any further recovery in that court by a carrier who has accepted payment on the land-grant basis, under protest, out of moneys appropriated by the Army Appropriation Acts for the transportation of persons im-

properly held by the accounting officers of the Government to be "troops of the United States."

Furthermore, the legislative intention in the matter is shown by an additional proviso which has been inserted after the aforesaid restrictive provisions in the Army Appropriation Acts, beginning with the Army Appropriation Act approved August 29, 1916 (39 Stat. 619). This proviso reads (*ib.*, 634):

> "*And provided further,* That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

A similar proviso has been contained in all subsequent Army Appropriation Acts.

This proviso was made necessary because of the refusal of the Comptroller of the Treasury, in a decision rendered Dec. 14, 1915 (22 Comp. Dec. 263), to pay full commercial rates for the transportation of Army officers' personal effects notwithstanding the decision of the Court of Claims of February 8, 1915, in *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States* (50 C. Cls. 412), holding that Army officers' personal effects were not property of the United States, the Comptroller of the Treasury, in the decision referred to, taking the position (now attempted to be applied by the Court of Claims in this case) that he was precluded, by the aforesaid restrictive provisions of the Army Appropriation Acts, from paying

out of the appropriations made by said Acts, more than 50 per cent for "Army transportation" by land-grant railroads.

The additional proviso added by Congress and inserted after said restrictions in the Army Appropriation Acts is a legislative construction of those restrictions which should be respected by the courts, and makes it clear that Congress never intended (as stated therein) "to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts."

VIII.

Effect of the Rule Announced by the Court of Claims.

The result of the ruling announced by the Court of Claims in this case would be to require the carriers, in every instance where they question the correctness of the rulings of the accounting officers as to rates or fares to be applied to the transportation of persons and property for the Government, to present their bills for the full amounts claimed by them to be due to the General Accounting Office, and then to protest the settlements of that office, thus eliminating entirely the disbursing officers, since the authority of the latter is limited to paying or refusing to pay bills as rendered. The only effect of this procedure would be to throw upon the General Accounting Office the duty of reducing such bills to a land-grant basis and to delay the settlement of the accounts of the railroads, the result

otherwise being the same as if the bills had been originally presented to the disbursing officer on a land-grant basis under protest. The circumlocution thus entailed accomplishes no good purpose, since in instances of the character here referred to the General Accounting Office has already ruled as to the basis on which it would authorize payment.

The decision of the Court of Claims, in this respect, is objectionable, we understand, to the War and Navy Departments of the United States, through which most of the transportation of persons and property for the Government occurs, besides curtailing, in large measure, the duties of the disbursing officers of the Government within the field of their lawful authority. Moreover, it affects not only differences as to the application of *land-grant deductions* to the transportation of passengers and property of the United States, but *all other differences as to rates and fares between the carriers and the Government,* as it would deprive the carriers of their right to accept from disbursing officers, under protest, the amounts which might be payable under decisions of the Comptroller General, and to present claims for the disputed amounts, in any case whatsoever, notwithstanding that rates and fares in interstate commerce are established and published in pursuance of Statutes of the United States.

The decision of the Court of Claims in this case is also, as above shown, in conflict with the express ruling of the Comptroller General sanctioning the practice by the railroad companies of rendering their bills for Government transportation in the reduced amounts, authorized to be paid by his decisions, under protest, with a view to taking the matter in dispute to the Court of Claims.

IX.

The Decision of the Court of Claims in This Case is Also in Conflict with its Previous Rulings.

Thus, in *James A. Baker, Receiver of the International & Great Northern Ry. Co., v. The United States*, (No. 34613), decided by the Court of Claims June 28, 1920 (55 Ct. Cls. 537), the Court of Claims gave judgment for the plaintiff, in a case identical in all substantial respects with the present case, as appears from the following findings of fact made by the Court, together with its "Conclusion of Law" therein:

"II.

"From the month of May, 1915, to and including the 16th day of June, 1916 [*i. e.*, during a portion of the period covered by the suit at bar], at the instance and request of proper officers of the United States Army, and in exchange for the regular United States Army transportation requests, plaintiff furnished transportation for large numbers of applicants for enlistment in the army, discharged military prisoners, and discharged retired and furloughed soldiers.

"III.

"For the transportation thus furnished, plaintiff rendered his bills to the disbursing officers of the army and the accounting officers of the Treasury as follows: [Here follows list of bills:]

"All of said bills were settled by the disbursing and accounting officers of the Government by applying to the transportation charges land grant rates under certain rulings of the Comptroller of the Treasury that the classes of passengers stated were troops of the United States within the mean-

ing of the land grant acts, and the aggregate amount of the reductions thus accomplished was and is the sum of $6,483.21.

"IV.

"In rendering said bills plaintiff stated them at land grant rates, in order to avoid their correction and return by disbursing officers, and adopted and followed the practice of entering a protest on the face of the bill against the application of land grant rates to transportation of the character specified.

"CONCLUSION OF LAW.

"Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $6,483.21 on authority of the *Union Pacific Case*, 52 C. Cls. 226; 249 U. S. 354. It is therefore adjudged and ordered by the court that the plaintiff recover of and from the United States the sum of six thousand, four hundred and eighty-three dollars and twenty-one cents ($6,483.21)."

As only the judgment of the Court of Claims in said case is reported, we are filing a certified copy of said findings of fact and conclusion of law therein.

CONCLUSION.

If appellant be held entitled to recover all the amounts required to be deducted on account of land-grant after January 1, 1914, when it commenced protesting the same, judgment should be directed for $147,322.72 ($71,560.92, shown by Finding of Fact VII, plus $75,467.74, shown by Finding of Fact VIII, plus $294.06, shown by Finding of Fact IX).

If appellant's recovery be limited to the items of transportation which were protested, judgment should be directed for $75,149.62 ($24,176.62, shown by Finding of Fact VII, plus $50,678.94, shown by Finding of Fact VIII, plus $294.06, shown by Finding of Fact IX).

Respectfully submitted.

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Appellant.

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IN THE

Supreme Court of the United States

No. 285, October Term, 1924.

Southern Pacific Company, *Appellant*,

vs.

The United States.

Appeal from the Court of Claims.

REPLY BRIEF FOR APPELLANT.

William R. Harr,
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REPLY BRIEF FOR APPELLANT.

I.

The brief for the Government divides the balances claimed in this case on account of land-grant deductions into those covered by appellant's bills or vouchers which bore no protest, regardless of when the transportation referred to was performed, and those which bore either the short or long form of protest; whereas ap-

pellant divides such vouchers into those rendered prior to January 1, 1914, on which date it began formally to accept payment at land-grant rates under protest, and those rendered subsequent to that date. Appellant submits that its classification should be adopted because, *after January 1, 1914,* the Government was fully apprised (whether each and every one of the vouchers submitted by it bore a formal protest or not) that land-grant deduction on the classes of persons referred to herein was *not* being conceded.

II.

It appears from their brief that counsel for the Government, in this court, are trying to construct a different agreement between the appellant and the United States from that under which the service was actually performed.

The theory of Government counsel, as we understand it, is that, as appellant knew that the Comptroller of the Treasury had ruled that the several classes of persons referred to in this case were entitled to the reduced fares stipulated for the transportation of "troops of the United States," and as the appellant did not insist, *prior* to January 1, 1914, upon its right to collect full commercial fares for the transportation of these classes that were not *in fact* "troops of the United States," it must be held to have "agreed," *both as to the transportation occurring prior and that occurring subsequent to January 1, 1914,* to transport such persons at land-grant fares, notwithstanding that, after said date, in rendering its bills or vouchers for such transportation to the Government disbursing officers upon

a land-grant basis, it expressly stated on such bills, or a very large number of them, that it was accepting payment on that basis under protest.

This argument of counsel for the United States, we submit, is based upon an entire misconception of the relations existing between the railroads of the country and the Government, as affected by the railroad land-grant laws and the land-grant equalization agreements referred to in Findings of Fact II and III (Rec., 5), as well as by the restrictive provisions of the Army Appropriation Acts with respect to payments to land-grant railroads. All that has ever been required by the railroad land-grant laws and the provisions of the Army Appropriation Acts with respect to land-aided railroads, and all that has ever been agreed to by the railroads in the land-grant equalization agreements, is that "*troops and property of the United States*" should be transported at not exceeding 50% of the fares and rates paid by private persons.

And as it has always been customary for the railroads to transport persons and property for the Government *without prepayment of charges,* the understanding and agreement between the railroads and the Government has always been (in the absence of an *express* agreement stipulating for different terms) that the amounts due the railroads for any such transportation were to be determined upon the basis of the applicable published tariff fares or rates on file with the Interstate Commerce Commission, less appropriate deductions on account of any land-grant distance involved, *where the persons or property transported fell within the category of "troops and property of the United States."* There is no authority or room, in

the long-established relationship between the carriers and the Government, for the construction, by the courts, of an *implied* agreement on the part of the railroads, to transport persons and property for the Government, such as that suggested by counsel for the Government in their brief in this case.

When, therefore, appellant transported the persons referred to in this case for the Government, it did so upon the understanding (there being no other charge *expressly* agreed upon) that it would be paid for such transportation at full commercial fares, *unless* the persons transported constituted a part of the "troops of the United States" within the meaning of the railroad land-grant Acts, and with the further understanding that, if the executive officers of the Government would not pay for such transportation on the basis to which appellant was legally entitled, it would have the right to sue in the Court of Claims for any balances due it on that account, within the period of limitation prescribed by law.

It is true that this Court held, in the *Oregon-Washington Case,* that notwithstanding the right of the carriers to payment at full commercial rates for the transportation of any property for the Government which did not fall within the category of "property of the United States," a carrier might be held to have "*conceded*" the land-grant rate, if, prior thereto, for a considerable period it accepted payment at land-grant rates for the transportation for the Government which was not property of the United States, *without protest or objection on its part*—indeed without, so far as the record before this court showed in that case, having ever claimed any higher rate. But the very

statement of that proposition shows that, *if the carrier referred to in that case had, at the time of payment, protested the requirement of land-grant deductions,* it would have been held by this court to be entitled to recover full commercial rates for such transportation. It is one thing to say that a carrier may *waive* its right to payment in full for a particular class of transportation, and quite a different thing to say that, because it has waived such right for a certain period, it can not afterwards assert it. If there be no waiver, the fact that the payment is prompt is immaterial. It is part of the obligation of the Government to pay as promptly as circumstances will permit, and it is for that reason that Government disbursing officers are provided by law.

It is further to be observed that, in the *Oregon-Washington Case,* the carrier was held to be endeavoring to take advantage of a *mistake in law* which it had apparently made in accepting payment at land-grant rates for the class of transportation involved therein, without any protest on its part. Here, the fact that, after January 1, 1914, the appellant was constantly notifying the disbursing officer of the Government that it was accepting payment by him on land-grant basis *under protest,* shows that appellant was laboring under no mistake as to its legal right to payment at full commercial fares for the classes of persons involved herein.

There is nothing in the Government form of transportation request which justifies the inference of such an agreement as is attempted to be implied by counsel for the Government in this case. Such transportation request is merely, as its name implies, a request by the

Government, through one of its heads of department, for the carrier to whom it is addressed to furnish the person designated therein certain transportation. (See form of Government transportation request set forth in 14 Comp. Dec. 975-976.) The amounts to be charged for such transportation are left by such transportation requests to be determined by the carriers upon the basis of the published tariffs, less land-grant in instances where the persons transported are actually "troops of the United States."

It might here be mentioned that nowhere in the requests is the term "troops of the United States" used.

The rendition by the carriers of their bills, and the payment of the same by the Government is simply a matter of *accounting*, and not of *contract*. The rights and liabilities of the parties have theretofore been fixed by the law and the published tariffs. Neither the disbursing nor the accounting officers of the Government can, by refusing to pay a carrier the amount to which it is lawfully entitled under the published tariffs, as modified by said railroad land-grant laws and equalization agreements, *force a new contract upon the carrier*. The decisions of the Comptroller of the Treasury as to the amounts due for any such service were binding upon the executive departments of the Government but not upon the carrier. The carrier may, of course, *waive* its right to payment at full tariff fares or rates, where the persons or property transported are not "troops and property of the United States," but such *waiver* or *concession* is certainly not to be construed to go beyond the particular case and foreclose the carrier from asserting its right to payment in full in a subsequent case.

It is clear, therefore, that all of the transportation referred to in this case was performed under the understanding and agreement between the Government and the appellant that it would be paid therefor at full *commercial fares*, since the persons transported did not fall within the category of "troops of the United States," and the transportation was not even requested as for "troops of the United States," and it is manifest that appellant cannot properly be held to have waived its right to payment on such basis in any instance in which it accepted payment under protest of the less amount tendered by the Government. Nor should appellant be held to have waived its right to payment at full commercial fares in any instance referred to in this suit occurring subsequent to January 1, 1914, because, as above stated, and as more fully shown in our main brief, the Government was fully apprised, after that date, that appellant was not conceding the land-grant deductions with respect to the classes of persons referred to herein.

The disbursing officer of the Government was, as we have shown in our main brief, the authorized agent of the Government in making the payments referred to herein, and, as we have also shown in our main brief, consequently, notice to the disbursing officer that such payments were being accepted under protest, and as part payment only, was sufficient. Besides there was nothing in the laws of the United States, or in the Departmental regulations enacted in pursuance thereof, which precluded a carrier from asking for and receiving payment (*under protest*) *on the only basis upon which it could be made, either by the disbursing or accounting officers* (in view of the decisions of the

Comptroller of the Treasury which were by statute made binding upon said officers), such protest being made simply to avoid any implication that otherwise might have arisen that the reduced amount received was accepted as in full for the services performed. On the contrary, as we have shown in our main brief, the practice of accepting *part* payment, under such circumstances, under protest, had the recognition and approval of the Comptroller of the Treasury and has also been approved by his successor, the Comptroller General.

And as the practice referred to was (and is) for the convenience of both the Government and the carriers, since it avoids the useless circumlocution, in such cases, of rendering bills at full commercial fares and having them reduced by the officers of the Government to a land-grant basis, and as it was for the convenience of the disbursing officers of the Government in order that they might pay so much of the charges as might be paid under the decisions of the accounting officers, and, further, as it is not inconsistent with the laws of the United States, we think it merits the approval of this Court.

Respectfully submitted,

WILLIAM R. HARR,
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In the Supreme Court of the United States

OCTOBER TERM, 1924

SOUTHERN PACIFIC COMPANY, APPELLANT
v.
THE UNITED STATES
No. 285

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Upon requests by the United States the Southern Pacific Company transported between March 1, 1912, and June 18, 1916, certain classes of persons, not soldiers in service. At the time the requests for transportation were made and prior thereto and during the entire period here involved the Comptroller of the Treasury, to quote from appellant's brief on page 3, "had ruled that said several classes of persons were to be regarded as 'troops of the United States.'"

Following the transportation the appellant billed the United States therefor at the reduced rates agreed upon with the United States for the transportation of "troops of the United States."

The appellant had but did not employ the alternative of billing the United States at full commercial rates, for which purpose a special form was available.

It used the form prescribed for cases where transportation was on the so-called Land-Grant or reduced-fare basis, certifying therein to the total amount which it claimed, that the account so stated was correct and just, and, in effect, that it was asking to be compensated on the Land-Grant-Rate basis. On some of the bills or vouchers presented there was stamped or typewritten one or another of two forms of what appellant denominates and what for convenience will herein be designated as a "protest."

The bills or vouchers were presented to a disbursing officer, whose authority was strictly limited to payment on the Land-Grant basis, and were paid by him and the sums so paid accepted by appellant without any other protest than that described. The theory of the United States is that the appellant, having received full payment of the claims presented by it, can not, notwithstanding the so-called protest, now claim additional payment. Essentially the only question in the case is as to value or significance of the protest, although appellant contends for payment as to certain claims where no protest of any kind was used.

ARGUMENT

Introduction

The total amount claimed when this case was finally submitted to the Court of Claims was $186,-282.20. Of this total, appellant now concedes that on the authority of *Oregon-Washington Railroad and Navigation Co.* v. *United States*, 255 U. S. 339, it is not entitled to recover $39,253.54. See appellant's brief, page 4. This amount was involved in vouchers presented before January 1, 1914, prior to which time no protest of any kind was used. Deducting the amount stated, the claim is now for $147,028.66.

Of the amount now claimed, approximately one-half (exactly $71,329.14) (spoken of hereinafter as Class 1) is asked in connection with vouchers upon which there was no form of protest of any kind. Of the remaining approximately one-half (exactly $75,699.52), $24,176.62 was involved with vouchers containing the so-called short form of protest (spoken of hereinafter as Class 2) and $50,678.94 with vouchers containing the so-called long form of protest. Of the last-named amount all was for the carriage of others than discharged soldiers (spoken of hereinafter as Class 3) except only $7,865.95, which was for the carriage of discharged soldiers (spoken of hereinafter as Class 4). These several classes will be dealt with separately in this argument.

I

The United States is not liable for the amount falling under Class 1, upon the vouchers involving which there was no protest of any kind

As to Class 1, hereinbefore described and involving $71,329.14 of the total claim, the appellant is not entitled to recover for two reasons, each sufficient to forcelose its claim.

First. It agreed and by its course of conduct subsequently conceded that it did agree to carry the persons where transportation was involved in Class 1 at Land-Grant Rates, a conclusion sustained by the following reasoning:

The appellant agreed with the United States to transport "troops of the United States" at the Land-Grant Rates. Since the transportation of the persons here involved, it has been held, and it must now be conceded, that they were not "troops of the United States." Appellant was under no obligation, therefore, by reason of the said agreement, to carry them at reduced rates. Knowing, however, that the United States regarded these persons as falling under the general head of "troops" and as such entitled to Land-Grant Rates for transportation and receiving from the United States requests for their transportation, the appellant transported them with the understanding and without protest at the time of transportation or thereafter that it did not transport them with the same understanding as to the rates at which they were to be carried as the understand-

ing of the United States relative thereto. The appellant so conceded by billing the United States at Land-Grant Rates, in effect stating that its total claim for the transportation was calculated upon that basis and that the account so stated was correct and just. The effect of this concession as to the terms of the agreement with the United States is to destroy any claim now made upon any other basis. *Oregon-Washington Railroad and Navigation Co.* v. *United States*, 255 U. S. 339.

Second. If the appellant by its course of conduct did not concede that the agreement with the United States was that just urged, it will certainly now be conceded that such was the understanding of the United States as to the nature and extent of its obligation. At most, the appellant contended (although as to these particular claims never expressing that contention) that it was entitled to full commercial rates. The amount to which the appellant was entitled was that in dispute between appellant and the United States. If, in such a situation, the appellant chose (as it did here) to present as the amount it claimed and as all that it claimed, certifying the amount to be correct and just, a certain named amount, and if thereupon it was paid that amount and received it without protest, then under those circumstances we have a perfect case of accord and satisfaction. *Murphy* v. *United States*, 104 U. S. 464; *Choteau* v. *United States*, 95 U. S. 61; *United States* v. *Adams*, 7 Wall. 463; *Chicago, etc., R. Co.* v. *Clark*, 92 Fed. 968, 977; 1 Cyc. 329.

The case of *United States* v. *Adams*, 7 Wall. 463, is especially valuable in this connection. It applies also to Classes 2, 3, and 4 discussed hereinafter. In that case contractors with the Government submitted certain claims to a specially created commission, were awarded a less amount than that claimed, for which they receipted in full but under protest. Instead of presenting their claims to the commission referred to, they had the alternative of asking payment in full either from Congress or the Court of Claims. This court held that having voluntarily submitted their claims to this commission in order to obtain a speedier settlement of disputed claims, where the whole situation showed that it was the purpose of the Government that claims settled by this commission should be finally determined, and having received payment thereof even under protest, the claimant was foreclosed from any right to further payments on the theory that it had received only a partial payment.

That appellant impliedly concedes a doubt as to its right to recover as to these items appears from the statement in its brief on page 5 that: "In any event, appellant should be held entitled to recover as to the items specifically protested." Our view is that for the reasons hereinbefore indicated there is no doubt at all that as to the items in Class 1 appellant has no right of recovery whatever.

II

The United States is not liable for the amount falling under Class 2, upon the vouchers carrying the so-called short form of protest

All that we have said under subdivision I of this argument applies equally to the items involved under Class 2. The only difference in the facts is that here the words, "amounts claimed in this bill accepted under protest," were stamped on the vouchers when presented. If we are right in our view that the agreement was that the appellant should carry the persons transported at the Land-Grant Rates, such being the implied condition of the requests for transportation, and if they were thereupon carried by the appellant without anything from it indicating any other understanding, then no other assertion or protest thereafter made in whatever language could alter or increase the obligation of the United States. Presenting its claim upon the Land-Grant basis, which it was under no requirement of any kind to do (it had the alternative of presenting its claim on the commercial rate basis, for which a special form was provided), the appellant conceded that the agreement was that the United States should pay on that basis. It said, in effect, "This company claims so much in full payment for the transportation of persons on a Land-Grant basis," which was wholly inconsistent with any contention expressed or not expressed that the agreement was not on that basis.

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And the doctrine of accord and satisfaction is equally applicable to these items. At the most as to these items, the claim of the appellant was disputed by the United States as to all over the amount paid. Recognizing that fact, and with no necessity for so doing, the appellant asked for payment as of its claim in full on the Land-Grant basis and was so paid. Obviously, the United States intended by such payment full and final settlement. Under such circumstances, acceptance worked satisfaction. (Cases cited, *supra*.) The statement stamped by appellant on the vouchers that payments thereunder would be accepted under protest—a statement which, if it had any meaning, was clearly repugnant to the terms of the vouchers—was so indefinite as to be meaningless and as a protest without value. We can do no better than to quote here what the court below said as to the protest (page 13 of the record):

> We frequently encounter the apparent belief that a "protest" is "something to conjure with" under almost any circumstances; that it wipes out the disastrous results of any course of conduct; and that it creates as well as preserves rights. Equally is it sometimes the view that whatever its form or applicability it is only necessary to label it a "protest" and it is a protest. And these observations are not at all antagonistic to the idea that there may in fact be protests, rightly so called, and that they may at times be very efficacious in the accomplishment of their intended purpose, but suggest rather the necessity of

determining whether a so-called "protest" is in fact and in legal effect a protest, and whether, under the circumstances, it accomplishes anything as affecting the rights of the protestor. In one of our early cases, 13 Ct. Cls. 70, a protest was characterized as "so much waste paper," and in numerous cases they have been held ineffective for any purpose.

We find no established rule with reference to any particular form of protest in general, and this quite naturally so since the circumstances of each case must largely determine the applicable form, although in some cases in which protests are provided for by statute particularity is required, as, for example, in the matter of protests as to customs duties when the requirement is that it shall set forth "distinctly and specifically and in respect to each entry or payment the reasons for his objections thereto," while in other cases wherein the action taken is of such specific character that there is but one possible subject matter for protest the requirement only is that there shall be protest, which by necessary implication addresses itself to but the one matter, and that the action of a party other than the protestor.

To us it seems but reasonable to hold that if the transaction itself does not so define the situation that a protest in general terms can have but one application, and that an application entirely consistent with the relations of both parties to the transaction, then a protest must so specifically state its subject

matter and the respect in which action had is objected to that its purpose may clearly appear on its face.

We know now, in our consideration of this case, that plaintiff's contention is that the transportation in question was not subject to land-grant deduction, but the short form of protest used presented no question of land grant to the disbursing officer any more than it presented any one of the several other questions which might be involved in data stated in the voucher. So far as appears it might have been a question as to the number of men, the mileage traveled, the correct land-grant mileage, or the gross rate, as well as the applicability of land-grant rates.

We quote further from the opinion below (page 16 of the record):

In addition to suggestions made as to the indefinite character of this protest, we are asked to conclude that a public voucher made in the detailed form indicated and certified to be correct, not only as to its details but as to the "amount claimed," and which is required to be completely filled in before certification, without alteration or erasure all to the evident purpose that there shall be stated a clean-cut demand which may be paid by a disbursing officer at the "amount claimed" and that only, for which it becomes his acquittance, can be converted into a claim for a partial payment with reserved right to make further claim as to the same service by stamping thereon the statement that the "amount claimed" which

has been stated and certified by the claimant, is "accepted under protest."

We can not subscribe to such a theory. Its consistency, as well as its apparent purpose to take advantage of a method of settlement designed to accomplish finality while at the same time subverting that purpose, condemns it. And in that connection the necessities of Government accounting are properly for consideration and perhaps ought to be reverted to more than they are. With these necessities and the disadvantages of lack of finality in Government accounting those doing business with the Government not only are, for the most part, familiar, but should be chargeable with knowledge and, unless required for the protection of a legal right not otherwise to be asserted, practices which impose unnecessary burdens on the governmental system should not be encouraged by judicial sanction. And for consideration also is the fact that appropriations are for the service of fiscal years—that they are available for such time thereafter as Congress has thought reasonable to permit the adjustment of claims payable therefrom, a situation indicative of intention to accomplish reasonably prompt presentment and settlement of claims.

And if by such a procedure as that under consideration the finality of a settlement such as those here involved may be suspended and an account thus settled be held to be still open for further claims, predicated on the same service, to be asserted at any time within the six-year period of limitation,

> is there any reason why such a protest stamped upon any voucher in settlement of any claim of any character might not obviate its finality and serve to hold the whole matter open and subject to further claim at least until the intervention of the statute of limitation? If there is one thing apparent, predicated upon our observation in these matters, it is the great need for a revised system which shall require the prompt presentation of claims not only to the administrative and accounting offices but to this court as well, and while we can not assume legislative function, and we certainly can not but recognize and protect any right legal under the present system, we are not disposed by judicial construction to extend beyond legal requirements the effect of unnecessary and detrimental practices.
>
> We think it quite clear that the use during this period of this form of protest could avail the plaintiff nothing. Aside from the infirmity in the form of the protest, which sufficiently determines its value, what must be said in the discussion of the following period as to the efficacy of any protest will be applicable.

That the so-called short form of protest was so indefinite as to be valueless is certainly not overcome by the Finding of Fact No. VI (page 6 of Record) that a subordinate clerk in the office of the disbursing quartermaster understood what was intended by the protest. The knowledge of an employee having wholly ministerial duties and having no duty relating to protests of any kind is not imputible to his

superiors. It is elementary in the rule relating to imputible knowledge that the knowledge must relate to what was within the scope of the agent's authority and certainly receiving protests was no part of this clerk's duties nor within the scope of his authority.

III

The so-called long form of protest was valueless as to items falling in Class 3

The vouchers falling in this class were for claims for the transportation of others than discharged soldiers, but the protest used protested only the payment of reduced fares for discharged soldiers and constituted, therefore, no protest whatever as to Class 3 vouchers. It follows that Class 3 is in the same situation exactly as Class 1 discussed above under subdivision I of this argument.

IV

The long form of protest is valueless as to claims for the transportation of discharged soldiers

There remains to be considered the effect of the so-called long form of protest as to claims for the transportation of discharged soldiers (this form of protest having been used as to such claims in the amount of $7,865.96).

We submit that here also the appellant has no further claim against the United States.

Much that we have already said in this argument is obviously equally applicable to this class of Appellant's claims. Reference is made to such preceding argument and also to the very able discussion of this

phase of the case in the opinion of the court below, pages 18 to 26, inclusive, of the record, and to the discussion of the identical question by Chief Justice Campbell, of the Court of Claims, in the opinion in *Western Pacific Railroad Co.* v. *United States*, being Case No. 287 on the docket of this Court, which case the Court has ordered submitted with this case. The opinion in that case is at page 57 of the record in No. 287. No purpose would be served by mere repetition here of these arguments already before the Court and amply and clearly stated in these two opinions.

There is no escape from the conclusion that appellant voluntarily billed the United States upon the Land-Grant basis as for its claims in full. It was paid upon that basis and accepted payment. Under such circumstances its so-called protest, as the court below clearly points out in the two opinions mentioned, was wholly valueless for the reasons:

First, the protest was repugnant to the claim. The claim was certified as correct and just and therefore, in effect, as in full. The protest says, in effect, "this claim is not in full." The only payment which the disbursing officer had authority to make was that called for by the claim; that is, payment in full. Accepting payment from him the appellant necessarily accepted it upon that condition and by acceptance repudiated any protest which was wholly inconsistent with acceptance.

The situation may be illustrated thus: A contract has been entered into between *A* and *B*. *B* has

performed and seeks payment. A dispute exists as to the amount due. *A* has placed in the hands of his servant *X* the amount he claims is the full amount to which *B* is entitled. The limit of *X's* authority is to pay that amount to *B* in full settlement of the claim, all of which *B* knows. Having such knowledge *B* accepts from *X* the amount in his hands. Any protest he makes to *X* is meaningless. The acceptance with knowledge of the condition forecloses further claim.

Second. The protest was made to a ministerial officer of the Government, having no authority of any kind relative to protests, and made with knowledge that it could not and would not reach officers of the Government having discretion in the matter or any authority to consider the protest until long after the payment by the ministerial officer of the amount claimed and certified to him as correct and just.

Suppose there had been no protest stamped or typewritten on the bill or voucher. The bill or voucher is presented. The amount claimed is paid. Thereafter claimant protests. Under the doctrine of Accord and Satisfaction clearly he has no further rights. But what is the difference between that situation and one in which a protest is made to an agent who has no authority to receive or consider protests and is under no duty to communicate them to his superiors? Such a protest is the same as no protest or as a protest made to a stranger or as a protest made after acceptance of payment.

Numerous cases supporting the conclusions stated are cited in the opinions below. Reference is here made especially to *De Arnaud's case*, 151 U. S. 483; *Chicago, Milwaukee & St. Paul Railway Co.* v. *Clark*, 178 U. S. 353, and *Savage, Executrix*, v. *United States*, 92 U. S. 382.

CONCLUSION

It is respectfully submitted that appellant, having elected to settle with the United States on the Land Grant basis and having so elected voluntarily and without duress of any kind, is not entitled to any additional payment either as to those claims presented by it which bore no protest or as to those which bore a protest whether in the so-called short form or the so-called long form. The decision of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General.

MERRILL E. OTIS,
Special Assistant to the Attorney General.

NOVEMBER, 1924.

○

SOUTHERN PACIFIC COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 285. Argued November 19, 20, 1924.—Decided May 11, 1925.

1. Where a railroad, for transporting applicants for enlistment in the Army, discharged, retired and furloughed soldiers, and civilian employees of the War Department, rendered its bills at land-grant rates, knowing that according to a ruling of the Comptroller of the Treasury such persons were to be regarded as "troops of the United States" for whose transportation only land-grant rates could be paid by disbursing officers, and accepted payment of its bills on that basis without protest, *held* that, though the Comptroller's ruling was erroneous, the railroad was bound by acquiescence and could not recover the difference between the amount received and the larger amount which it would have been lawfully entitled to charge under its tariff. P. 268.
2. But *aliter* where the bills, though rendered at land-grant rates, bore a short form of protest; "Amounts claimed in this bill accepted under protest"; or a form more extended and explanatory; since by these the government officers were sufficiently notified that payment at the lower rates would not be accepted in final settlement., P. 268.
3. Where, however, the railroad rendered most of its bills with indorsed protests, but a considerable number during the same period without them, as to these latter it was bound by its acceptance of the land-grant rates. P. 270.

59 Ct. Cls. 36, reversed.

APPEAL from a judgment of the Court of Claims rejecting the appellant's claim for the difference between

amounts paid by the Government for transportation at land-grant rates and the lawful tariff charges.

Mr. William R. Harr, with whom *Mr. Charles H. Bates* was on the briefs, for appellant.

Mr. Merrill E. Otis, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Southern Pacific Company, having carried certain persons as passengers at the request of the Government and received payment for such transportation at land-grant rates, brought this action to recover the difference between the rates thus paid and the full tariff rates. The Court of Claims, on its findings of fact, being of opinion that the claimant by its course of proceeding and acceptance of the land-grant rates was precluded from the recovery of the balance of the full tariff rates, entered judgment dismissing the petition. 59 Ct. Cls. 36.

The facts found, shortly stated, are as follows: The claimant in 1911 became a party to the so-called "land-grant equalization agreements" with the Quartermaster General, by which it agreed (subject to certain exceptions not here material) to transport troops of the United States at the net rates effective over land-grant lines, that is, at fifty per cent. of the rates charged private parties.[1] Thereafter, between March 1, 1912, and June 18, 1916,[2] the claimant transported, upon Government requests, a number of applicants for enlistment in the Army, discharged, retired and furloughed soldiers, and civilian employees in the War Department.

[1] See *United States* v. *Union Pacific Railroad*, 249 U. S. 354, note 1.

[2] The date on which the so-called "interterritorial military arrangement" became effective as to the claimant and the other railroads.

It had been previously ruled by the Comptroller of the Treasury that such persons were to be regarded as troops of the United States and that their transportation could be paid for only at land-grant rates; and disbursing officers, as the claimant knew, were authorized to make payments on that basis only. Because of this ruling the claimant presented its bills for all such transportation on the form of voucher prescribed for transportation at land-grant rates,[3] in which it stated in appropriate columns the "gross amount" of the regular fares, the "amount to be deducted on account of land-grant," and, in the final column, the "amount claimed" (the gross amount less the land-grant deduction); and certified the accounts to be correct. All these vouchers were presented to the Disbursing Quartermaster at San Francisco, and were paid by him in the amounts claimed; and all these payments were accepted by the claimant.

Prior to January 1, 1914, the claimant, except in one instance, accepted payment of these bills without protest or other objection.

After January 1, 1914, however, there was written, typewritten or stamped by the claimant upon a part of the land-grant vouchers, before they were paid, a so-called short form of protest, reading as follows: "Amounts claimed in this bill accepted under protest." This form of protest was understood by the clerk who handled these bills in the office of the Disbursing Quartermaster as being "addressed to the matter of land-grant rates," for the purpose of reserving the claimant's right to present a further claim for full commercial fares to the accounting officers or the courts. The claimant used this form of protest on 201 vouchers between January 1 and October 1, 1914;[4] but 303 of the vouchers presented and paid during this period bore no protest.

[3] See 14 Comp. Dec. 967.

[4] Also on one previous voucher.

On October 1, 1914, the claimant began "systematically" to endorse in typewriting on the land-grant vouchers, before presentment, a so-called long form of protest, reading as follows: "As U. S. Government accounting officers claim they have no authority to allow or pay for the transportation of discharged soldiers more than the fares for troops of the U. S. such fares are shown herein but under protest and S. P. Co. for itself and connecting carriers does not waive any of its rights to full published tariff fares and any payment at any less amount will be accepted as part payment only for the services performed." This form of protest was used on 516 vouchers between October 1, 1914, and June 18, 1916,[5] but 212 of the vouchers presented and paid within this period bore no form of protest whatever.

The claimant brought the present action in March, 1918, shortly before the decision in *United States* v. *Union Pacific Railroad*, 249 U. S. 354. In that case the railroad company, a party to the land-grant equalization agreement, having transported persons of all the classes that are here in question except civilian employees, had presented to the Auditor for the War Department claims for such transportation at the full tariff rates, and the Auditor and Comptroller having successively refused to allow these claims at more than the land-grant rates, had then brought suit in the Court of Claims to recover the full passenger fares. It was held by this court that such persons were not troops of the United States within the meaning of the land-grant acts and the equalization agreements, and that the railroad company was entitled to recover the full amount claimed. In the present case the Court of Claims held that in the light of this decision none of the classes of persons here in question could be regarded as troops of the United States, and recognized that the claimant would have been en-

[5] Also on four previous vouchers.

titled originally to compensation at the full passenger rates. This is not questioned by the Government; the sole contention being that, as was further held by the Court of Claims, the action of the claimant in voluntarily presenting its bills at the land-grant rates and accepting payment thereof, precludes it from recovery of the balance of the full rates to which it would otherwise have been entitled.

The question when the substantive right to recover an amount justly due from the Government is lost through some act or omission upon the part of the claimant, was considered at length in *St. Louis, Brownsville & Mexico Railway* v. *United States, ante,* p. 169, in which the decisions bearing on this question were collated. It was there said that this right "can be lost only through some act or omission on the part of the claimant which, under the rules of the common law as applied by this Court to claims against the Government, discharges the cause of action. Acquiescence by the claimant in the payment by the Government of a smaller amount than is due will ordinarily effect the discharge. Acquiescence can be established by showing conduct before the payment which might have led the Government to believe that the amount allowed was all that was claimed, or that such amount, if paid, would be received in full satisfaction of the claim. Acquiescence can, also, be established by showing conduct after the payment which might have led the Government to believe that the amount actually received was accepted in full satisfaction of the original claim. But to constitute acquiescence within the meaning of this rule, something more than acceptance of the smaller sum without protest must be shown. There must mave been some conduct on the part of the creditor akin to abandonment or waiver or from which an estoppel may arise." The defense of acquiescence by the acceptance of a smaller sum than was actu-

ally due, it was further pointed out, is not to be confused with the defense "of accord and satisfaction or compromise of a disputed claim," evidenced by a receipt in full or a release.

Manifestly there was here "no accord and satisfaction or compromise of a disputed claim." The claimant, while presenting its bills for transportation at the land-grant rates and accepting payment thereof, did not execute either a receipt in full for its transportation charges or a release thereof. The crucial question then is whether the conduct of the claimant with reference to the acceptance of the land-grant rates establishes an acquiescence in the payment thereof, in the nature of an abandonment or waiver, that operated as a discharge of its claim for the full passenger rates. This is to be determined by the application of the rules stated in *St. Louis, Brownsville & Mexico Railway* v. *United States, supra.*

1. It is clear that as to all the bills which were presented at land-grant rates prior to January 1, 1914, and paid and accepted without protest or other objection, the conduct of the claimant was such as to lead the Government to believe that the land-grant rates were accepted in full satisfaction of the original claims and established an acquiescence on the part of the claimant that operated as a discharge of the claims for the full passenger rates. *Oregon-Washington Railroad* v. *United States,* 255 U. S. 339, 347; *Western Pacific Railroad* v. *United States,* 255 U. S. 349, 355; *Louisville & Nashville Railroad* v. *United States,* 258 U. S. 374, 375; *Louisville & Nashville Railroad* v. *United States,* 267 U. S. 395; *St. Louis, Brownsville & Mexico Railway* v. *United States, supra.* This is not seriously questioned by the claimant.

2. The case is manifestly different as to those bills presented on the land-grant vouchers which bore either the short or long form of "protest." While a "protest" has no

definite legal significance in connection with the receipt of money—being ordinarily used in connection with the involuntary payment of money under legal compulsion or duress—it may nevertheless be effective as an indication of non-acquiescence in the receipt of the amount paid as a final settlement of the claim. In the present case it is clear that the use of these protests upon the vouchers was reasonably adapted to lead the Government officials to believe that the amounts of the vouchers were not all that was claimed and such amounts were not accepted in full satisfaction of the transportation claims. This was not only brought to the attention of the disbursing officer in the first instance, but later, in due course, to the attention of the accounting officers by whom the payment of the vouchers was approved. The clerk in the office of the Disbursing Quartermaster who handled these bills understood that the short form of protest was addressed to the matter of land-grant rates, for the purpose of reserving the claimant's right to present a further claim for full commercial fares; and there is no suggestion that either the Disbursing Quartermaster or the accounting officers understood that the payment of the vouchers on which the protests were endorsed was received in full settlement of the transportation claims.

We find no essential difference in this respect between the short and long forms of protest. The short form gave notice that the amounts claimed in the bills were "accepted under protest;" and the long form gave notice that by reason of the claim of the Government accounting officers the fares were shown at land-grant rates, under protest, without waiver of the claimant's right to full tariff fares, and that the payment of less than the full fares would be accepted "as part payment only for the services performed." And the fact that a preliminary reference was made merely to the claim of the accounting officers as to discharged soldiers, did not destroy the effect

of the protest in its entirety as a notice that the land-grant rates were claimed and accepted in part payment only.

We conclude that the endorsement of these protests on the vouchers sufficiently notified the government officers that the payment of the land-grant rates was not accepted in final settlement of transportation claims, and that, as to such vouchers, the Government has not established an acquiescence in the payment of the land-grant rates which discharges the claims for the remainder of the full tariff fares. And we are of opinion that the claimant was not compelled, at its peril, to present its claims originally for the full tariff rates, as was done in the *Union Pacific case*—which would have involved delay in the payment of any part of its claims—but that, having first presented its claim for the land-grant rates accompanied by notices showing that it did not accept such rates in final settlement, it was thereafter entitled to bring suit for the recovery of the remainder of the full tariff fares.

3. A different question arises, however, as to those bills which were presented on land-grant vouchers after January 1, 1914, upon which no protests were endorsed. It is perhaps true that the claimant, although presenting its bills on land-grant vouchers, might have sufficiently preserved its right to full compensation by a general notice, in advance, to the War Department that in so doing and in accepting payment on such vouchers at land-grant rates it did not intend to waive its claims to the full tariff rates and reserved the right to present subsequently its claims for the difference between the amounts paid and the full rates, and that in such case it would not have been essential to the claimant's right to full compensation that each specific bill should be accompanied by a notice showing its non-acquiescence therein as a final settlement. This, however, it did not do. It gave no such general

notice, but adopted for the preservation of its rights the method of endorsing its protests upon the separate vouchers. Having adopted this method of procedure it was compelled to follow it in order to preserve its rights. Between January 1 and October 1, 1914, about three-fifths of the vouchers, and between October 1, 1914 and June 18, 1916, about two-sevenths, bore no protest. The number is too great to be presumptively explained on the theory of inadvertence and oversight. There is nothing in the findings of fact to indicate that this was the case, and no explanation whatever appears for the absence of the protests. Under these circumstances we think that as to all the bills presented on land-grant vouchers after January 1, 1914, which bore no protest whatever, the case is in the same situation as the bills which were presented prior to that date, without any protest; and that for the same reason it must be held that the presentation of these vouchers at the land-grant rates and the acceptance of payment thereof, established an acquiescence on the part of the claimant which discharged its claim for further compensation at the full tariff rates.

The judgment of the Court of Claims is accordingly reversed, and the cause remanded to that court for further proceedings in conformity to this opinion.

Judgment reversed.